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No. 0

In the Supreme Court of the United States

SAN REMO HOTEL L.P., THOMAS FIELD, ROBERT FIELD, AND T&R INVESTMENT CORP.,
Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF CITY PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The City and County of San Francisco adopted an ordinance that prohibited hotels from continuing their historic, duly-licensed operation as hotels, but allowed hotel owners to avoid those restrictions by paying an exaction. Petitioners brought this action challenging the exaction based on the Takings Clause of the Fifth Amendment and 42 U.S.C. § 1983. The United States Court of Appeals for the Ninth Circuit initially refused to reach the merits of the constitutional challenge, finding that petitioners were required to ripen their claim by seeking compensation in state court under *Williamson County Planning Commission v. Hamilton Bank of Johnson City*. Once the claim was ripe, the Ninth Circuit again refused to reach the merits of the constitutional challenge, finding that the claim was barred by issue preclusion. In reaching that conclusion, the Ninth Circuit held that the California Supreme Courts' refusal to apply heightened scrutiny to legislative exactions under state law is consistent with federal Takings law. The questions presented are:

1. Is a Fifth Amendment Takings claim barred by issue preclusion based on a judgment denying compensation solely under state law, which was rendered in a state court proceeding that was required to ripen the federal Takings claim?

2. Is deferential scrutiny, akin to the rational basis test, appropriate for exactions imposed by legislation even though exactions imposed by administrative adjudications are subject to heightened scrutiny under *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties are set forth in the caption. T&R Investment Corporation does not have a parent corporation. No publicly held company owns any interest in T&R Investment Corporation or San Remo Hotel, L.P.

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PETITION FOR WRIT OF CERTIORARI

Petitioners San Remo Hotel L.P., Thomas Field, Robert Field, and T & R Investment Corp. pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on April 14, 2004.

OPINIONS BELOW

The order of the United States Court of Appeals for the Ninth Circuit denying the petition for rehearing en banc is unreported and is reproduced as Appendix (App.) A. The opinion of the Ninth Circuit is reported as *San Remo Hotel, L.P. v. City and County of San Francisco*, 364 F.3d 1088 (9th Cir. 2004), and is reproduced as Appendix B. The orders of the United States District Court for the Northern District of California are unreported and reproduced as Appendices C and D. The opinion of the California Supreme Court is reported as *San Remo Hotel v. City and County of San Francisco*, 27 Cal.4th 643, 41 P.3d 87, 117 Cal.Rptr.2d 269 (2002), and is reproduced as Appendix E.

JURISDICTION

The opinion of the Ninth Circuit was filed and entered on April 14, 2004. App. B. The order of the Ninth Circuit denying the petition for rehearing en banc was entered on June 9, 2004. App. A. This petition for writ of certiorari is timely filed under Rule 13.1 of the Rules of the Supreme Court. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides, in pertinent part, that "private property [shall not] be taken for public use, without just compensation."

The Residential Hotel Unit Conversion and Demolition Ordinance adopted by the City and County of San Francisco, as codified at Chapter 41 of the San Francisco Administrative Code, is reproduced as Appendix F.

STATEMENT OF THE CASE

A. Statement of Facts[1]

The San Remo Hotel was built in 1906 and has been operated as a tourist hotel since the 1950s. Petitioners bought the San Remo Hotel in 1971 when it was fully-licensed as a tourist hotel. After petitioners restored the building in 1976, the City issued new permits and licenses that authorized unlimited tourist use of the hotel. Since then, the City has collected hotel taxes based on the tourist use of the hotel.

The City adopted the first version of the Residential Hotel Unit Conversion and Demolition Ordinance (HCO or Hotel Ordinance) in 1981, despite the City Attorney's advice that it was unconstitutional. Under the Hotel Ordinance, rooms

[1] This case was decided on a motion to dismiss under Fed.R.Civ.P. 12(b)(6); therefore, all of the facts alleged in the complaint are presumed true. This statement of facts is based on the operative complaint, which appears at pages 108-136 of the Excerpts of Record, filed in the Ninth Circuit on September 5, 2003.

were designated as residential units based on their use during a particular 32-day period: from August 22 to September 23, 1979. HCO § 41.4(n) and (q), App. F-202a, 203a. Thus, a room was designated as a residential unit if it was occupied by the same person during those 32 days in 1979, even if the room had never before been rented to a residential tenant.

The consequence of being designated a residential unit was that the room could only be rented to tourists on a daily basis during the tourist season from May 1 to September 30. During the rest of the year, only weekly or monthly rentals were allowed. The Hotel Ordinance allowed hotel owners to obtain a permit to rent the residential units to tourists year-round. But, that permit would be subject to a condition requiring the payment of a replacement housing fee or the creation of new residential units at another location either by construction of new units or rehabilitation of unusable units. The replacement housing fee was set at 40% of the cost of constructing replacement housing plus the site acquisition cost.

The San Remo Hotel's 62 rooms were mistakenly designated as residential units even though there were only 10 residential tenants. Nevertheless, petitioners (like many hotel owners) were able to continue their historical use as a primarily tourist hotel. As allowed by the Hotel Ordinance, petitioners rented the rooms to tourists during the tourist season, did not rent rooms on a daily basis during the rest of the year when there was little or no tourist business, and kept about 10 residential tenants year-round.

In 1990, the City adopted a new version of the Hotel Ordinance that severely restricted petitioners' operation of the hotel. The new ordinance reduced the allowed daily rental to tourists during the tourist season from 100% to 25% of the

designated residential units; prohibited even that 25% tourist use unless the rooms were rented to residents during the rest of the year (thereby subjecting those rooms to San Francisco's rent control ordinance, which severely restricts evictions); and doubled the replacement housing fee imposed on permits to escape the Hotel Ordinance's use restrictions. HCO §§ 41.13(a)(4), 41.19(a)(3), App. F-227a, 236a-237a. The Hotel Ordinance explicitly states that the City doubled the replacement housing fee from 40% to 80% of the cost of constructing new housing because adequate public funding was no longer available. HCO § 41.3(m), App. F-198a.

Because the 1990 Hotel Ordinance eliminated petitioners' right to continue the historical use of their hotel, they immediately applied for a permit to escape the new restrictions. Three years later, the San Francisco Planning Commission granted a permit for the San Remo Hotel, but imposed an exaction as a condition: Petitioners were required to pay the City an exaction of $567,000 under the Hotel Ordinance. Petitioners appealed that decision to the Board of Supervisors, which affirmed the Planning Commission's decision by a 6-5 vote. A dissenting Supervisor called the City's exaction "organized extortion."

B. Procedural History

In 1993, petitioners brought this federal court action to challenge the exaction imposed by the City. The district court issued a preliminary injunction, finding that the Hotel Ordinance was facially unconstitutional. Three years later, the district court granted the City's motion for summary judgment and dissolved the preliminary injunction.

Two years later, the Ninth Circuit held that petitioners' as-applied Takings claims were unripe because petitioners had not sought compensation in the state courts as required by *Williamson County Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1102 (9th Cir. 1998) (*San Remo I*).

Two years later, the California Court of Appeal reversed the state trial court's dismissal of the state law compensation claims, finding that heightened scrutiny applies to the exaction even though it was imposed by legislation. *San Remo Hotel v. City and County of San Francisco*, 82 Cal.App.4th 1105, 100 Cal.Rptr.2d 1, 9-11 (2002).

Two years later, the California Supreme Court reversed the state appellate court and rejected petitioners' state law claims for compensation in a 4-3 decision. *San Remo Hotel v. City and County of San Francisco*, 27 Cal.4th 643 (2002) (*San Remo II*), App. E. In particular, that court found that under the state constitution, there is no heightened scrutiny for exactions imposed by legislation. *San Remo II*, App. E-130a-144a. All seven justices agreed that the state court had not decided any federal question. *San Remo II*, App. E-107a, n.1, E-170a, E-194a.

One year later, the district court granted the City's motion to dismiss under Fed.R.Civ.P. 12(b)(6). The district court found that petitioners' federal Takings claims were barred by issue preclusion, based on the state supreme court decision, and the statute of limitations. App. C-50a-51a, C-85a, D-73a, D-90a.

Finally, eleven years after this action was filed, the Ninth Circuit affirmed the district court solely on the ground that

petitioners' claims were barred by issue preclusion, and did not reach the statute of limitations issue. *San Remo Hotel v. City and County of San Francisco*, 364 F.3d 1088 (9th Cir. 2004) (*San Remo III*), App. B. The Ninth Circuit held that issue preclusion can bar federal Takings claims even though the state court proceedings were required to ripen those claims. App. B-12a-16a. Under the applicable state law rules of issue preclusion, petitioners' claims were barred only if the substantive federal Takings law is the same as California state compensation law. App. B-16a-17a. The Ninth Circuit held that the claims were barred by issue preclusion because federal law and state law are the same, i.e., there is no heightened scrutiny for exactions imposed by legislation. App. B-17a-21a.

REASONS THE PETITION SHOULD BE GRANTED

I. THE NINTH CIRCUIT'S DECISION SQUARELY CONFLICTS WITH THE SECOND CIRCUIT AND CREATES A TRAP THAT PRECLUDES ALL FEDERAL COURTS FROM REVIEWING THE MERITS OF FEDERAL TAKINGS CLAIMS

The practical effect of the Ninth Circuit's rule on issue preclusion, when combined with the ripeness requirement of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), is that federal Takings claims can never be considered on the merits in any federal court, including this Court. Indeed, one commentator has dubbed the Ninth Circuit's combination of ripeness and issue preclusion, "The *Williamson* Trap". Meacham, Madeline J., *The Williamson Trap*, 32 Urb. Law. 239 (2000). Moreover, this is not just a trap for the unwary, it is a "procedural snare that swallows the careful takings claimant as well as the unwary". Breemer, J. David,

Overcoming Williamson County's Troubling State Procedures Rule, 18 J. Land Use & Envtl. L. 209, 240, 242 (2003) ("following *Williamson County*, many federal courts have converted the state procedures rule into a permanent jurisdictional bar by applying state rules of claim and issue preclusion.").

The Ninth Circuit squarely acknowledged that its holding "expressly conflicts" with the Second Circuit's holding that state rules of issue preclusion cannot prevent the federal courts from reviewing the merits of federal Takings claims. *San Remo III*, App. B-15a, discussing *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118, 128 (2003), cert. pet.(on other issues) pending, No. 04-142. The other Circuits that have considered this issue are also split, with the Third and Tenth Circuits agreeing with the Ninth Circuit[2] and the Fourth, Fifth and Eleventh Circuits agreeing with the Second Circuit.[3]

This split in the Circuits reflects the lower courts' struggle to deal with the consequences of the *Williamson County* ripeness doctrine. The interplay of ripeness and issue preclusion creates an irreconcilable conflict between principles of finality, which militate in favor of issue preclusion, and principles of fairness, which require the

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[2] *Peduto v. City of North Wildwood*, 878 F.2d 725, 729 (3d Cir. 1989); *Wilkinson v. Pitkin County Bd. of County Commissioners*, 142 F.3d 1319, 1323-1325 (10th Cir. 1998).

[3] *Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283 (4th Cir. 1998); *Jennings v. Caddo Parish School Bd.*, 531 F.3d 1331 (5th Cir. 1976); *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1305-1306 (11th Cir.1992).

federal courts to review the merits of federal takings claims even if the state courts deny compensation under state law. This split, and the underlying conflict between the principles of finality and fairness, can only be resolved by this Court.

The Second Circuit explained the reasons that the constitutional mandate should prevail over the Ninth Circuit's rule:

> It would be both ironic and unfair if the very procedure that the Supreme Court required [Takings plaintiffs] to follow before bringing a Fifth Amendment takings claim - a state court-inverse condemnation action - also precluded [them] from ever bringing a Fifth Amendment takings claim.

Santini, 342 F.3d at 130.

As the Second Circuit emphasized:

> There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims.

Santini, 342 F.3d at 128, quoting *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415 (1964).

The Second Circuit refused to follow the Ninth Circuit's rule because it creates a "Catch-22 for Takings plaintiffs": under *Williamson County*, they are required to seek compensation in state court to make the federal Takings claim

ripe, but once the federal Takings claim is ripe, it would be defeated by the preclusive effect of the state court judgment. *Santini*, 342 F.3d at 127.

If not reversed by this Court, the Ninth Circuit's rule will prevent federal Takings' plaintiffs from seeking review on the merits in this Court. In this case, for example, petitioners could not have filed a petition for certiorari to review the California Supreme Court decision because that court did not decide any federal question. *San Remo II*, App. E-107a, n. 1.[4] Indeed, the California courts could not have decided the federal Takings claims because those claims may not be brought in state court until the state compensation remedy has been denied. *Breneric Associates v. City of Del Mar*, 69 Cal.App.4th 166, 188-189, 81 Cal.Rptr.2d 324, 338-339 (1998) (*Williamson County* ripeness requirement applies in state courts); see also *Santini*, 342 F.3d at 126-127, discussing *Melillo v. City of New Haven*, 249 Conn. 138, 154, 732 A.2d 133, 143 n. 28 (1999) (Connecticut applies same rule as *Breneric*). Even this petition cannot raise the merits; instead, it can only raise the substantive federal Takings law

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[4] All seven justices of the California Supreme Court expressly stated that they expected that petitioners would obtain a ruling on the merits of their federal claims in this federal court action. The majority stated that petitioners "explicitly reserved their federal causes of action" and that because petitioners relied "solely on state law, no federal question has been presented or decided in this case." *San Remo II*, App. E-107a, n. 1. Both dissents made the same point. *San Remo II*, App. E-170a (Baxter and Chin, dissenting: "Plaintiffs have reserved their federal claims and, if rebuffed here, will resume their federal litigation"); App. E-194a (Brown, dissenting: "I dissent and hope the plaintiffs find a more receptive forum in the federal courts.").

issue because it was a necessary predicate of the Ninth Circuit's decision on the issue preclusion question.

The Ninth Circuit's barrier to federal court consideration of Fifth Amendment claims is indefensible. Under the Ninth Circuit's rule, the Fifth Amendment's protection of property rights is relegated to the "status of a poor relation" of the other rights secured by the Bill of Rights. *Cf., Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

In sum, the Ninth Circuit's rule effectively precludes consideration of the merits of federal Takings claims in both state and federal court and leaves plaintiffs with nothing but state compensation claims in the state courts – and no opportunity at all for this Court to review the merits. The Ninth Circuit's rule cannot be squared with this Court's rationales in *Williamson County* and *England*; therefore, this Court should grant the petition for certiorari and adopt the Second Circuit's holding in *Santini*.

II. THERE IS A NATIONWIDE SPLIT OF AUTHORITY ON WHETHER EXACTIONS IMPOSED BY LEGISLATION ARE SUBJECT TO HEIGHTENED SCRUTINY

Although the Ninth Circuit did not reach the merits, under the applicable state law rules of issue preclusion, it was required to determine whether the substantive federal law of Takings is the same as California state law governing compensation claims. App. B-16a-17a. The Ninth Circuit concluded that the federal Takings rule is the same as the state law rule announced by the California Supreme Court: there is no heightened scrutiny for exactions imposed by legislation. *San Remo III*, App. B-17a-21a. The Ninth Circuit concluded that "rational relationship" is the correct federal test for

legislative exactions (*id.*), despite this Court's rejection of that test for Takings claims challenging administrative exactions because it is too deferential. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

Justices Thomas and O'Connor recognized ten years ago that the distinction between legislative and administrative exactions raises an important question and that there already was "confusion in the lower courts". *Parking Association of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116 (1995) (dissenting from denial of certiorari). Their dissent emphasized that:

> It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

Id., 515 U.S. at 1117-1118.

Now, there is even more confusion; in fact, there is a "nationwide split of authority" on the issue of whether heightened scrutiny applies to legislatively imposed exactions. E.g., Faus, Richard, *Exactions, Impact Fees, and Dedications – Local Government Responses to Nollan/Dolan Takings Law Issues*, 29 Stetson L. Rev. 675, 704 (2000). State courts in New York, Texas, Ohio, Illinois, Washington and federal courts in the First and Fourth Circuits have applied heightened scrutiny to exactions imposed by legislation.[5] By

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[5] *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 107, 111, 542 N.E.2d 1059, 1065-1066, 1068 (1989); *Town of Flower*

contrast, state courts in Colorado, Oregon, Arizona, North Dakota, and Georgia and a federal court in the Tenth Circuit have applied a deferential level of scrutiny akin to the rational basis test.[6]

The level of scrutiny is critical, of course, because it determines the outcome in almost every case. As Gerald Gunther observed, the rational basis test is "minimal scrutiny in theory and virtually none in fact". Gunther, Gerald, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972). Thus, in this case, the application of deferential scrutiny resulted in a finding that the San Francisco Hotel Ordinance is

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Mound v. Stafford Estates Ltd., 47 Tex. Sup. Ct. J. 497, 135 S.W.3d 620, 640-642 (2004); *Home Builders Ass'n v. City of Beavercreek*, 89 Ohio St.3d 121, 128, 729 N.E.2d 349, 356 (2000); *Northern Illinois Home Builders Ass'n, Inc. v. County of Du Page*, 165 Ill.2d 25, 31-33, 649 N.E.2d 384, 388-389 (1995); *Trimen Development Co. v. King County*, 124 Wash.2d 261, 273-274, 877 P.2d 187, 194 (1994); *National Ass'n of Home Builders v. Chesterfield County*, 907 F.Supp. 166, 168-169 (E.D. Va. 1995), aff'd 92 F.3d 1180 (4th Cir. 1996); *City of Portsmouth v. Schlesinger*, 57 F.3d 12, 14 (1st Cir. 1995).

[6] *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 695-697 (Colo. 2001); *Rogers Machinery, Inc. v. Washington County*, 181 Or.App. 369, 397-398, 45 P.3d 966, 982 (2002); *Home Builders Ass'n v. City of Scottsdale*, 187 Ariz. 479, 486, 930 P.2d 993, 1000 (1997); *Southeast Cass Water Resource Dist. v. Burlington Northern Railroad Co.*, 527 N.W.2d 884, 896 (N.D. 1995); *Parking Ass'n of Georgia v. City of Atlanta*, 264 Ga. 764, 766, 450 S.E.2d 200, 203 n. 3 (1994); *Harris v. City of Wichita*, 862 F.Supp. 287, 294 (D. Kan. 1994), aff'd, 74 F.3d 1249 (10th Cir. 1996).

constitutional. Yet, when a virtually identical New York City ordinance was subjected to heightened scrutiny, it was found unconstitutional. *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059 (1989).[7]

This case presents a clear choice between the two conflicting views that animate the split in authority. The courts that apply heightened scrutiny believe that it is required to protect against the danger of government leveraging, i.e., by imposing a permit condition that requires the payment of an exaction that is unrelated or disproportionate to the development allowed by the permit. On the other hand, the courts that apply deferential scrutiny believe that the democratic political process will protect even small groups of property owners from the danger of leveraging.

The former view was adopted by the New York Court of Appeals, which explained that heightened scrutiny is necessary to distinguish regulations involving "the adjustment of rights for the public good" from regulations forcing "'some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole'". *Seawall*, 74 N.Y.2d at 107, 111, 542 N.E.2d at 1065-1066, 1068, quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Thus, the critical feature of the New York City ordinance that led to its invalidation was its imposition of an exaction:

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[7] This Court denied certiorari in *Seawall*, 493 U.S. 976, and a prior case involving the constitutionality of San Francisco's Hotel Ordinance. *Lambert v. City and County of San Francisco*, 529 U.S. 1045, 120 S.Ct. 1549 (2000) (Justices Scalia, Kennedy, and Thomas dissenting). This is a better case than *Lambert* to resolve the issue of heightened scrutiny because the City denied the Lamberts' permit instead of granting it with an exaction condition. *Lambert*, 120 S.Ct. at 1550.

> [B]y equating the "cure" with dollars -- i.e., permitting "buy-out" payments of $45,000 per [hotel] unit . . . -- the terms of [the ordinance] itself demonstrate that the obligations placed on a few property owners are just the kind which could, and should, be borne by the taxpayers as a whole.

Seawall, 74 N.Y.2d at 112, 542 N.E.2d at 1069.[8]

By contrast, the four-justice majority of the California Supreme Court decided to apply a very deferential level of scrutiny under the state constitution because the City used generally applicable legislation to impose the exaction. *San Remo II*, App. E-140a-142a. Their primary rationale was that while the political process is not sufficient to protect the rights of a single property owner when an administrative agency imposes an exaction, it is sufficient to protect the rights of even very small groups of property owners when a legislative body imposes an exaction. *San Remo II*, App. E-141a.

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[8] The California Supreme Court majority asserted that *Seawall* was "impliedly overruled" by *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). *San Remo II*, App. E-145a, n. 15, citing *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 94 N.Y.2d 96, 107, 721 N.E.2d 971, 975 (1999). That assertion is wrong. *Del Monte Dunes* holds that the rough proportionality test of *Dolan* does not apply when a permit is *denied*. *Del Monte Dunes*, 526 U.S. at 703. Similarly, *Bonnie* does not address the *Seawall* holding that heightened scrutiny applies to an exaction imposed by legislation; instead, it was only concerned with the appropriate level of scrutiny for a permit *denial*. *Bonnie*, 94 N.Y.2d at 108, 721 N.E.2d at 976. Neither *Del Monte Dunes* nor *Bonnie* affects the analysis of *Seawall* or this case because the City did not deny petitioners' permit, the City granted the permit -- with a $567,000 exaction.

The three dissenting justices disagreed, as Justice Janice Rogers Brown explained:

> [P]rivate property, already an endangered species in California, is now entirely extinct in San Francisco. The City and County of San Francisco has implemented a neo-feudal regime where the nominal owner of property must use that property according to the preferences of the majorities that prevail in the political process - or, worse, the political powerbrokers who often control the government independently of majoritarian preferences.

San Remo II, App. E-175a-176a.

The Texas Supreme Court recently reached a similar conclusion:

> [W]e think it entirely possible that the government could "gang up" on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others.

Town of Flower Mound v. Stafford Estates Ltd. Partnership, 47 Tex. Sup. Ct. J. 497, 135 S.W.3d 620, 641 (Tex. 2004).

Nevertheless, the Ninth Circuit concluded that the California Supreme Court's state law ruling is consistent with federal Takings law. In short, the Ninth Circuit concluded that, under the federal Takings Clause, only a deferential level of scrutiny is applied to legislative exactions. *San Remo III*, App. B-17a-21a. The Ninth Circuit's conclusion defies this Court's repeated statements that the Takings test requires a higher level of scrutiny than the rational basis test under the

Due Process Clause. *Nollan*, 483 U.S. at 834 n. 3 ("our verbal formulations in the takings field have generally been quite different" from due process and equal protection); *Dolan*, 512 U.S. at 391 (Takings claims are subject to judicial review that is higher than the "minimal level of scrutiny" mandated by due process and equal protection).

As this Court recognized in *Nollan* and *Dolan*, limiting judicial review to a deferential level of scrutiny provides no protection against the dangers of governmental leveraging. Indeed, a deferential level of scrutiny enables local governments to put zoning up for sale; thus, rewarding local governments that enact severe use restrictions, but allow property owners to buy their way out of the restrictions. Indeed, under the Ninth Circuit's deferential scrutiny, cities could prohibit all development except for one-story, single-family homes, but offer a second story permit for $20,000, an apartment building permit for $10,000 per unit, a commercial building permit for $50,000 per floor, and so forth. That very result was both predicted and condemned by this Court:

> One would expect that a [permit] regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes.
>
> . . . . .
>
> [T]he situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety . . ., adding the unrelated condition alters the purpose to one which, while it may be

> legitimate, is inadequate to sustain the ban. Therefore, even though, in a sense, requiring a $100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster.

Nollan v. California Coastal Commission, 483 U.S. 825, 837 and n. 5 (1987).

This case presents an egregious illustration of the leveraging allowed by deferential scrutiny. The City based the $567,000 exaction on the mistaken report that all of the San Remo Hotel's rooms were occupied by residential tenants during the specified 32 days in 1979. But, even if the San Remo Hotel had always been occupied by residential tenants, the City may not impose conditions based on the City's "loss" of the owner's prior use of the property:

> The city may not constitutionally measure the magnitude of its loss, or of the . . . exaction, by the value of facilities it had no right to appropriate without payment.

Ehrlich v. City of Culver City, 12 Cal.4th 854, 883, 50 Cal.Rptr.2d 202, 262 (1996).

In this case, the state court distinguished *Ehrlich* because the exaction in that case was imposed by an administrative adjudication. *San Remo II*, App. E-139a-140a. But, that distinction demonstrates that applying different levels of scrutiny to administrative and legislative exactions encourages local governments to simply change the techniques and labels used to impose exactions. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025 n. 12 (1992) (deferential scrutiny "amounts to a test of whether the

legislature has a stupid staff"); *Nollan*, 483 U.S. at 841 (compliance with the Fifth Amendment is "more than an exercise in cleverness and imagination").

In sum, this case presents a perfect opportunity to resolve the nationwide split of authority. The stark conflict in the outcomes of this case and *Seawall* highlights the rationales of the two possible tests as well as the outcome-determinativeness of the choice between the tests. This issue has percolated long enough in the lower courts. No further light will be shed on this issue by allowing the lower courts to continue grappling with the issue. This Court should grant the petition and resolve the nationwide split of authority.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Dated: September 7, 2004.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-15853

[Filed June 9, 2004]

THE SAN REMO HOTEL L.P.; et al.,
Plaintiffs-Appellants,

v.

SAN FRANCISCO CITY AND COUNTY,
a Municipal Corporation; et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
D.C. No. CV-93-01644-DLJ
D. Lowell Jensen, District Judge, Presiding

Before: Fernandez, Hawkins, and Thomas, Circuit Judges

ORDER

The Application of Pacific Legal Foundation for Leave to File Brief Amicus Curiae in Support of Rehearing En Banc is GRANTED. The Brief is ordered filed.

Judge Fernandez recommended denying the Petition for Rehearing En Banc. Judges Hawkins and Thomas voted to deny the Petition.

The full court was advised of the Petition for Rehearing En Banc and no Judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The Petition for Rehearing En Banc is DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-15853

[Filed April 14, 2004]

THE SAN REMO HOTEL L.P.; THOMAS FIELD; ROBERT FIELD; T&R INVESTMENT CORP., Plaintiffs-Appellants,	)
v.	)
SAN FRANCISCO CITY AND COUNTY, a Municipal Corporation; DEPARTMENT OF CITY PLANNING; CITY PLANNING COMMISSION; BOARD OF PERMIT APPEALS; BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO, Defendants-Appellees.	)

Appeal from the United States District Court
for the Northern District of California
D.C. No. CV-93-01644-DLJ
D. Lowell Jensen, District Judge, Presiding

Before: Ferdinand F. Fernandez, Michael Daly Hawkins, and Sidney R. Thomas, Circuit Judges

OPINION

HAWKINS, Circuit Judge:

In the second appeal before this court, the owners of the San Remo Hotel challenge the constitutionality of a San Francisco ordinance which restricts an owner's ability to convert "residential" hotel rooms to tourist use. A prior panel ordered *Pullman* abstention at plaintiffs' request, and also declared some claims unripe, deferring a decision until after the claim had been litigated in the California courts. *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095 (9th Cir. 1998) ("*San Remo I*").

After losing their state takings claims in the California courts, *San Remo Hotel v. City and County of San Francisco*, 27 Cal. 4th 643, 117 Cal. Rptr. 2d 269, 41 P.3d 87 (2002) ("*San Remo II*"), the plaintiffs now seek to assert their federal takings claims in federal court. However, we agree with the district court that the California Supreme Court's adjudication of the state takings claims was an "equivalent determination" of the federal takings claims, and that plaintiffs are therefore barred from relitigating the takings issues by the doctrine of issue preclusion, pursuant to this circuit's precedent in *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995) ("*Dodd I*"), and *Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998) ("*Dodd II*").

FACTS AND PROCEDURAL HISTORY

Most of the relevant factual background was recounted in our prior published decision; we repeat it here as necessary to

set the stage for this appeal:

I. The Statutory Framework

San Francisco has enacted several hotel conversion ordinances in order to stop the depletion of housing for the poor, elderly and disabled. The City conducted a study that revealed that between 1975 and 1979, almost 20 percent of the residential hotel units in the City were lost due to demolition and conversion, and that most of the conversion was from residential to tourist use. [Hotel Conversion Ordinance (HCO)] § 41.3(d). In 1979, the City enacted its first HCO as a temporary measure, which it later codified as a permanent ordinance in 1981.

Under the 1981 HCO, hotel units could be converted to non-residential use only if the owner obtained a permit to convert. The City granted a permit only if the property owner provided relocation assistance to hotel residents and replaced the residential hotel units being converted through one of the following methods: (1) construction of an equal number of replacement units; (2) rehabilitation of an equal number of residential hotel units; or (3) contribution of a fee to the City's Residential Hotel Preservation Fund Account in the amount of 40 percent of the construction costs of the number of units converted (the "in lieu payment"). HCO §§ 41.12 & 41.13.

The 1981 HCO defined a "residential unit" as a hotel room occupied by a permanent resident as of September 23, 1979, *i.e.*, the 1981 HCO was an extension of the 1979 moratorium. To determine

whether a unit was residential as of September 23, 1979, the City sent surveys to the operators of hotels.

In May 1990, the City repealed the 1981 HCO and enacted the 1990 HCO. This new ordinance made four changes from the old law: (1) it prohibited the summer tourist use of residential rooms; (2) it increased the in lieu payment from 40 percent to 80 percent; (3) it added the requirement that any hotel that rents rooms to tourists during the summer must rent the rooms at least 50 percent of the time to permanent residents during the winter; and (4) the new law did not provide for relief on the ground of economic hardship. To ease the effect of the new ordinance, the 1990 HCO allowed hotel owners who applied before May 12, 1990, to pay a 40 percent in lieu fee, instead of the otherwise-required 80 percent fee.

Entirely distinct from the HCOs are the City's zoning ordinances. In 1987, the City enacted the North Beach Neighborhood Commercial District zoning ordinance ("zoning law"), which requires conditional use authorization to establish a tourist hotel. Owners who establish a prior non-conforming commercial use are exempt from this requirement of obtaining a conditional use permit. The zoning law borrows the September 23, 1979, classification from the HCO in order to determine what is a residential unit. In other words, a hotel unit that had been mistakenly characterized as residential under the HCO but that in fact was operating commercially as a tourist unit in 1987 would *not* be said to have a prior non-conforming use under the zoning law, despite the actual use of the unit.

II. The Facts

The plaintiffs are the owners of the San Remo Hotel, as well as the hotel itself. . . . [Plaintiffs] bought the San Remo Hotel in 1971, when it was zoned for commercial use and was subject to no restrictions on tourist use. [They] leased the hotel to Jean Irribarren (not a party) from 1977 to 1983. Irribarren spoke English badly, and when the 1979 survey arrived and asked him to indicate the nature of the hotel units for the new HCO, Irribarren mistakenly indicated that every single one of the hotel's 62 units was residential. [Plaintiffs] had no notice or knowledge of this survey, or of Irribarren's responses.

In 1984, after the lease to Irribarren expired, [plaintiffs] again began operating the hotel. In [their] 1984 Annual Unit Usage Report, [plaintiffs] stated that the actual use of the hotel on September 30, 1984, was still as 62 residential units and zero tourist units. [They] explain this usage report by arguing that the 1981 HCO was not burdensome to comply with, even with the residential designation. In particular, the 1981 HCO allowed for unlimited tourist use of residential rooms from May to October, which are the most profitable months for a tourist hotel.

On May 11, 1990, [plaintiffs] applied under the 1990 HCO to convert the 62 residential rooms to tourist use. The City Zoning Administrator objected on the ground that if such a conversion were granted, the hotel would then be operating in violation of the zoning laws. After all, the 1987 zoning law looked back to the September 23, 1979, survey and characterized the hotel as entirely residential.

Therefore, even though the hotel had arguably been operating as a tourist hotel when the zoning law was enacted in 1987, it was not considered a prior non-conforming use. In order to satisfy the zoning law, [plaintiffs] had to obtain a conditional use permit, which [they have] never gotten.

[Plaintiffs] then filed an application for a conditional use permit, so the hotel would no longer be operating in violation of the zoning law. The Planning Department scheduled a hearing for August 20, 1992, before the City Planning Commission to decide the merits of this application. On August 19, 1992, the Planning Department concluded that the Commission lacked jurisdiction to decide what the hotel's prior zoning status had been, and the parties agreed to continue the hearing until the Zoning Administrator could make such a determination. On September 9, 1992, the Zoning Administrator formally declared that the hotel had not been zoned for commercial use. Therefore, a conditional use permit would be required.

[Plaintiffs] appealed to the Board of Permit Appeals ("BPA"), arguing that the hotel was already a permitted conditional use or a prior non-conforming use. [Plaintiffs] also argued that using the HCO to convert the hotel into a truly residential hotel would be an unconstitutional taking and a denial of equal protection. The BPA rejected this argument and held the hotel bound by the 1979 classification. It concluded that the prior disobedience to the 1987 zoning law was not a prior non-conforming use but a special exception allowed (but no longer) by the Zoning Administrator. Thus, the BPA held that

[plaintiffs were] required to get a conditional use permit.

The case then went back to the Planning Commission, which on January 21, 1993, approved [plaintiffs'] application for a conditional use permit, provided: (1) [plaintiffs] paid 40 percent of the cost of replacement housing to make up for the loss of the 62 residential units; (2) [plaintiffs] offered lifetime leases to existing long-term tenants; and (3) [plaintiffs] fulfilled other minor conditions. The BPA affirmed.

On March 12, 1993, [plaintiffs] filed a petition for administrative mandamus in state court, challenging the BPA's decision that classified the hotel as residential. This mandamus action has been stayed by stipulation of the parties.

On April 19, 1993, the City's Board of Supervisors rejected [plaintiffs'] appeal of the Planning Commission's decision and upheld the conditions for the conditional use permit.

On May 4, 1993, [plaintiffs] filed this action against the City under 42 U.S.C. § 1983.

San Remo I, 145 F.3d at 1098-1100 (internal footnotes omitted).

The complaint alleged, among other things, that the 1990 HCO was a facial and as-applied taking under the Fifth Amendment. In the prior appeal, plaintiffs sought and were granted *Pullman* abstention on their facial takings claim. *Id.* at 1104-05. The panel also held that plaintiffs' as-applied challenge was not ripe, and required plaintiffs to seek

compensation in state court pursuant to *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985). *San Remo I*, 145 F.3d at 1102.

The plaintiffs then proceeded to state court, seeking (1) a petition for a writ of administrative mandate to overturn the City's administrative determination that they were required to obtain a conditional use permit in order to use all the hotel rooms for tourist rental, and (2) compensation for the taking of private property without just compensation in violation of the California constitution. *San Remo II*, 27 Cal.4th at 649. Although they could have also asserted their federal takings claims in California court, plaintiffs specifically reserved their federal claims for adjudication in federal court, pursuant to *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 420-21, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964).

The state trial court denied the writ petition and sustained a demurrer to the takings claims. The California Court of Appeal reversed, concluding that the plaintiffs had pled facts sufficient to effect a taking under the California constitution when applying the *Nollan/Dolan*[1] standard of scrutiny to the monetary fee. 27 Cal.4th at 657. The California Supreme Court reversed, affirming the conclusion of the trial court. *Id.* at 679.

In analyzing the state takings claim, the California Supreme Court noted that the California constitution protects a "somewhat broader range of property values" than the

[1] *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

corresponding federal provision, but that it otherwise generally construes the clauses congruently. *Id.* at 664. Accordingly, it relied on both state and federal takings cases to reach its decision, concluding that the heightened scrutiny applied by the United States Supreme Court in *Nollan* and *Dolan* did not apply to an ordinance of general applicability such as the one at issue, *id.* at 664-72, and that the fee imposed by the statute bore a reasonable relationship in both intended use and amount to the perceived problems stemming from a change in the hotel's use. *Id.* at 672-77. The California Supreme Court also rejected plaintiffs' as-applied challenge, concluding that the mitigation fee was reasonably based on the number of units that were self-reported as residential in 1979, and pointing out that the complaint contained no specific allegations regarding the hotel's use on that initial status date, only that it was used by "transient and tourist" guests since 1916. *Id.* at 677-79.

Plaintiffs then returned to federal court, seeking to adjudicate their federal takings claims. The district court, however, reinstated its earlier ruling that the facial challenge to the HCO was barred by the statute of limitations. It also determined that the plaintiffs did not actually state a separate "as-applied" challenge to the HCO, as the alleged harm arose not from a particular application of the HCO, but from its passage. Alternatively, the district court also found that the takings claims were barred by the doctrine of issue preclusion, because the substantive California takings law was coextensive with federal takings law. Because we agree with the district court's reasoning with respect to the issue preclusion doctrine, we express no opinion on its alternate holding regarding the statute of limitations.

STANDARD OF REVIEW

Decisions regarding issue preclusion are reviewed de novo, *see Littlejohn v. United States*, 321 F.3d 915, 919 (9th Cir. 2003), as are questions of constitutional law. *See Krug v. Lutz*, 329 F.3d 692, 695 (9th Cir. 2003).

DISCUSSION

I. *Applicability of Issue Preclusion where* Pullman *or* Williamson County *requires adjudication in state court*

The district court concluded that plaintiffs' takings claims should be dismissed under the doctrine of issue preclusion because the takings issues were fully litigated in state court. Plaintiffs assert that there should be no issue preclusion where a plaintiff is required to litigate in state court pursuant to *Pullman* abstention and his federal claims have been specifically reserved under *England*, or where a plaintiff cannot assert a ripe takings claim in federal court until he has sought compensation in state court under *Williamson County*. Plaintiffs argue that "involuntary" trips to state court in these circumstances should not preclude federal adjudication of federal claims, regardless of what issues were actually litigated and decided in state court.

To begin with, we must carefully draw a distinction between claim preclusion and issue preclusion. Claim preclusion precludes relitigation of claims that were raised or should have been raised in earlier litigation. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984). Issue preclusion, on the other hand, forecloses relitigation of factual or legal issues that have been actually and necessarily decided in earlier litigation. *Id.* The City does not dispute that the plaintiffs' *England*

reservation was sufficient to avoid the doctrine of *claim* preclusion; rather, it argues that this circuit's decisions in *Dodd I* and *Dodd II* illustrate that issue preclusion may still apply even when a plaintiff has reserved federal claims pursuant to *England*.

The Dodds had purchased property in a Forest Use Zone in Hood River County, Oregon, intending to build a retirement home. *Dodd I*, 59 F.3d at 855. After their purchase, the County approved an ordinance requiring that forest dwellings be allowed in forest use zones only where "necessary and accessory" to forest use. *Id.* at 856. A few years later, they applied for and were denied applications for building permits, variances, zoning changes, etc. *Id.* They pursued various state remedies, including a state action asserting a claim under the Oregon takings clause. *Id.* at 857. Although not in state court involuntarily as a result of *Pullman* abstention, they specifically reserved their right to have any federal takings claim adjudicated in federal court. *Id.*

The Dodds filed a federal action as well, asserting violation of the federal takings clause; the action was stayed pending resolution of the Oregon case, which was ultimately decided adversely to the Dodds. *Id.* In *Dodd I*, we refused to apply *claim* preclusion to dismiss the Dodds' federal takings claim. *Id.* at 861-63. However, we went on to note that "the question of *issue* preclusion is still very much in this case." *Id.* at 863 (emphasis added). We explained that the lower court had not decided whether the Oregon Supreme Court's decision on the state takings claim was "an equivalent determination under the federal takings clause so as to invoke the doctrine of issue preclusion." *Id.* The case was remanded for further proceedings.

In the second appeal, we compared the Dodds' state law claim that they were denied a substantial beneficial use of their property with the federal takings analysis of whether an "economically viable use" of their property remained, and concluded that the issue in the two proceedings was identical, and that the other requirements for issue preclusion under Oregon law were satisfied. *Dodd II*, 136 F.3d at 1225-27. More importantly for purposes of this case, we specifically rejected the Dodds' argument that their reservation of federal takings claims under *England* prevented operation of the issue preclusion doctrine. 136 F.3d at 1227 ("the reservation doctrine does not enable them to avoid preclusion of issues actually litigated in the state forum"). As we noted:

> To the extent that they fully litigated a necessary issue in the course of the state proceedings that is identical to an issue before the federal court, the Dodds are precluded from taking a second bite of the apple. The teachings of the Supreme Court are instructive in this regard:
>
> > There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all.

Id. at 1227-28 (quoting *Allen v. McCurry*, 449 U.S. 90, 104, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980)).

Plaintiffs also urge us to follow the reasoning of the Second Circuit in its recent decision, *Santini v. Conn. Hazardous Waste Mgmt. Serv.*, 342 F.3d 118 (2d Cir. 2003),

which held that a plaintiff who must proceed in state court to ripen his takings claim under *Williamson County* should not then be precluded from raising an identical claim in federal court, so long as the plaintiff reserved his federal claim under *England*. 342 F.3d at 128. *Santini*, however, expressly conflicts with another Ninth Circuit precedent, *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362, 365 (9th Cir. 1993), which held that claim preclusion *can* bar adjudication in federal court even where *Williamson County* requires a plaintiff to first seek compensation in state court. *See Santini*, 342 F.3d at 128 (expressing disapproval of *Palomar* and other cases, and deciding to "part ways with most of our sister circuits"). Of course, we are not free to simply disregard *Palomar* and *Dodd II* in favor of out-of-circuit precedent.[2]

Accordingly, we are compelled to follow *Dodd I*/*Dodd II*/*Palomar* and hold that the doctrine of issue preclusion can

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[2] Recognizing this, plaintiffs argue that *Palomar*/*Williamson County* should not be followed because of the Supreme Court's intervening decision in *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 118 S. Ct. 523, 139 L. Ed. 2d 525 (1997), in which the Court held that defendants can remove takings cases to federal court even though the removal statute only allows removal of cases that could have been brought originally in federal court. *Id.* at 163-65. *College of Surgeons*, however, does not even cite *Williamson County*, much less overrule it. *See Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18, 120 S. Ct. 1084, 146 L. Ed. 2d 1 (2000) ("This Court does not normally overturn, or so dramatically limit earlier authority *sub silentio*."). Other circuits have also rejected the argument that *College of Surgeons* modified the ripeness requirements of *Williamson County*. *Kottschade v. City of Rochester*, 319 F.3d 1038, 1040-41 (8th Cir.), *cert. denied*, 124 S. Ct. 178, 157 L. Ed. 2d 46 (2003); *Santini*, 342 F.3d at 129 n.6.

apply to bar relitigation in federal court of issues necessarily decided in state court, notwithstanding that plaintiffs must litigate in state court pursuant to *Pullman* and/or *Williamson County*. We must therefore determine whether the district court properly applied issue preclusion on the facts of this case. *See Dodd I*, 59 F.3d at 863.

II. *Issue Preclusion under California Law*

Issue preclusion applies if the state courts would give preclusive effect to the judgment of the state court and the state and federal substantive law of takings are equivalent. *Dodd I*, 59 F.3d at 863; *Dodd II*, 136 F.3d at 1225. California courts apply the doctrine of issue preclusion (also referred to as collateral estoppel in state courts) if: (1) the issue decided in the prior case is identical with the one now presented; (2) there was a final judgment on the merits in the prior case, and (3) the party to be estopped was a party to the prior adjudication. *Stolz v. Bank of America*, 15 Cal.App.4th 217, 222, 19 Cal. Rptr. 2d 19 (1993).[3] As the district court

[3] Plaintiffs argue that issue preclusion in California applies only to questions of fact that were decided in the earlier proceeding, and not to issues of law, citing *Albertson v. Raboff*, 46 Cal.2d 375, 384-85, 295 P.2d 405 (1956). Because the California Supreme Court merely sustained the demurrer, and did not include any factual determination, plaintiffs argue that it should not be given any preclusive effect. *Albertson*, however, merely held that only those facts necessary to the prior judgment are considered res judicata in a second action. California courts recognize that issue preclusion can apply to questions of law, so long as the application of the doctrine would not work injustice. *See, e.g., Rutherford v. State*, 188 Cal. App. 3d 1267, 1283, 233 Cal. Rptr. 781 (1987); *United States Fire Ins. Co. v. Johansen*, 270 Cal. App. 2d 824, 834-35, 76 Cal. Rptr. 174 (1969); *Pacific Maritime Assn. v. California Unemp. Ins. Appeal Bd.*, 236 Cal. App. 2d 325, 333, 45 Cal. Rptr. 892 (1965).

concluded, the California Supreme Court's decision in *San Remo II* satisfies this test. The facial and as-applied takings challenges raised in state court are identical to the federal claims asserted by the plaintiffs, and are based on the same factual allegations. The California Supreme Court decision was a final judgment on the merits, and the plaintiffs were a party to the state court adjudication.

Moreover, as required by *Dodd I*, the determination of the state takings claims was "an equivalent determination" of the federal takings claims. 59 F.3d at 863. In *San Remo II*, the California Supreme Court noted that the California takings clause actually protects a broader range of property values than the federal takings clause, because the California provision includes the concept of "damage" to the property as well as "taking." 27 Cal. 4th at 663-64. Aside from that difference, the California high court noted that it had construed the clauses congruently. *Id.* at 664. Thus, in reaching its decision on the merits of the plaintiffs' state takings claims, it applied "the relevant decisions of both this court and the United States Supreme Court." *Id.*

Plaintiffs contend, however, that California takings law is not coextensive with federal takings law, in part because the California Supreme Court failed to apply the "heightened scrutiny" of *Nollan* and *Dolan* to the monetary exactions in this case. In *Nollan*, landowners challenged the California Coastal Commission's decision to condition the Nollans' building permit on the grant of an easement across their beachfront. 483 U.S. at 828. The Court noted that it had long recognized that land-use regulation does not effect a taking if it "'substantially advance[s] legitimate state interests' and

does not 'den[y] an owner economically viable use of his land.'" *Id.* at 834 (*quoting Agins v. Tiburon*, 447 U.S. 255, 260, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980)). It pointed out that prior cases had not elaborated on the standards for determining what type of connection was required between the regulation and the state interest. *Id.* The Court went on to require an "essential nexus" between the condition and the state's purpose, and found that such a nexus was lacking in that case. *Id.* at 837.

A few years later, the Court revisited the exactions issue in *Dolan*, a case in which the city conditioned approval of a building expansion on the dedication of land for a public greenway and pedestrian/bicycle pathway. 512 U.S. at 379-80. The Court found that, unlike in *Nollan*, there was some connection between the conditions and the proposed expanded development. *Id.* at 387-88. It then went on to consider the degree of connection required, and ultimately settled on an "intermediate position" similar to that employed by numerous state courts, i.e., that the municipality must show some form of "reasonable relationship" between the required dedication and the impact of the proposed development. *Id.* at 389-91. The Court, however, thought the term "reasonable relationship" might be confusingly similar to the term "rational basis," and thus created a new term: "rough proportionality." *Id.* at 391; *see also id.* ("No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.").

Plaintiffs argue the heightened "rough proportionality" review of *Dolan* should be applied to both their facial and as-applied takings claims. The California Supreme Court carefully examined this contention and concluded that *Nollan/*

Dolan does not apply to generally applicable legislation such as the ordinance in this case, but only where the government exercises discretionary powers, and acts more adjudicatively than legislatively. 27 Cal.4th at 664-72. The Court reasoned that heightened scrutiny is necessary when the city's action is isolated and discretionary, because there is more danger that the city will improperly leverage its power against a single landowner. *Id.* at 666-67. When the city acts legislatively, however, and enacts an ordinance that applies a fee across the board according to a set formula, the danger is diminished, because there is no discretionary application and because the group affected can use the elective processes to petition for change in the law. *Id.* at 668-72. The California Supreme Court thus instead analyzed whether the HCO bore a reasonable relationship to the loss of housing, which it considered a legitimate goal for the common good, and concluded that there was such a relationship. *See id.* at 673-678.

The California Supreme Court's analysis was thus equivalent to the approach taken in this circuit, which has also rejected the applicability of *Nollan/Dolan* to monetary exactions such as the ones at issue here. For example, in *Commercial Builders of N. Cal. v. Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 504 U.S. 931, 118 L. Ed. 2d 593 (1992), the City of Sacramento found that nonresidential development created a need for low income housing in the city, and enacted an ordinance which conditioned the issuance of nonresidential building permits on the payment of a fee, calculated according to a formula, into a fund designed to assist in financing low-income housing. *Id.* at 873. We affirmed, finding the ordinance was reasonably related to legitimate public purposes. *Id.* We also specifically rejected

the contention that *Nollan* materially changed the level of scrutiny to be applied to the ordinance. *Id.* at 874.[4]

Plaintiffs argue *Commercial Builders* should be disregarded because it was a pre-*Dolan* decision. However, *Dolan* simply refined the test articulated in *Nollan*, and, in any event, post-*Dolan*, this court again rejected the application of the "rough proportionality" requirement to a monetary exaction. In *Garneau v. City of Seattle*, 147 F.3d 802 (9th Cir. 1998), a divided panel upheld a city ordinance that required landlords to pay a $1,000 per tenant relocation assistance fee to low income tenants displaced by the change of use or substantial rehabilitation of a property. Judge Brunetti concluded that *Dolan* and *Nollan* provided "no support" for the plaintiffs' claims and specifically noted that *Dolan*'s "rough proportionality" test was necessarily inapplicable to facial takings challenges. *Id.* at 808, 811.[5]

Furthermore, the Supreme Court itself has limited the reach of *Nollan/Dolan*, explaining that "we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions — land-use decisions conditioning approval of development on *the dedication of property to public use.*" *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702, 119 S. Ct. 1624, 143 L.

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[4] The court went on to say that in any event, there was a sufficient "nexus" between the fee provision at issue and the burdens caused by commercial development to pass constitutional muster. *Id.* at 875.

[5] District Judge Williams concurred in the result, but would have held that the takings clause did not apply to monetary fees, and that the claim should more appropriately be characterized as a due process violation. *Id.* at 817-21.

Ed. 2d 882 (1999) (emphasis added). In *Del Monte Dunes*, the Court approved of jury instructions based on the more classic "substantially advances" takings formulation, which asked the jury to evaluate whether or not a city's actions in denying a building permit on a specific piece of property were "reasonably related to legitimate public interests." *Id.* at 704; *see also Hotel & Motel Ass'n. v. City of Oakland*, 344 F.3d 959, 968 (9th Cir. 2003) (holding ordinance substantially advanced a legitimate state interest because a reasonable relationship existed between the regulation and the public purpose it was meant to serve); *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030, 1041 (9th Cir. 2000) (noting in rent control takings case that a "challenged regulatory action 'substantially advances' its interest if it bears a reasonable relationship to that interest" and that *Del Monte Dunes* "teaches that a reasonable relationship does not depend on the State's action being roughly proportional to its asserted interests").

The California Supreme Court applied the "reasonable relationship" test to the plaintiffs' facial and as-applied takings claims. *San Remo II*, 27 Cal.4th at 672-79. In light of *Del Monte Dunes* and this circuit's precedent, this was an "equivalent determination" of such claims under the federal takings clause. *See Dodd I*, 59 F.3d at 863. Accordingly, the district court correctly concluded that federal takings claims are barred from litigation under the doctrine of issue preclusion.

AFFIRMED.

APPENDIX C

U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

No. C- 93-1644-DLJ

[Filed April 16, 2003]

SAN REMO HOTEL L.P,
THOMAS FIELD, ROBERT FIELD, AND
T&R INVESTMENT CORP.,
Plaintiffs,

v.

CITY AND COUNTY OF SAN FRANCISCO,
a Municipal Corporation, on behalf of the
DEPARTMENT OF CITY PLANNING,
CITY PLANNING COMMISSION,
AND BOARD OF SUPERVISORS,
Defendants.

ORDER

On March 21, 2003, the Court heard argument on defendants' motion to dismiss plaintiffs' Third Amended Complaint. Andrew W. Schwartz appeared on behalf of defendants; Paul F. Utrecht appeared on behalf of plaintiffs

("San Remo"). Having considered the arguments of counsel, the papers submitted, the applicable law, and the record in this case, the court hereby GRANTS defendants' motion.

I. BACKGROUND

A. Factual Background and Procedural History

The Plaintiffs, Thomas and Robert Field (the "Fields"), own and operate the San Remo Hotel, a 62-unit property in San Francisco.

In 1981, the City of San Francisco enacted the Residential Hotel Unit Conversion and Demolition Ordinance ("HCO"), which limited the conversion of residential hotel units to nonresidential tourist use. *San Francisco Admin. Code*, Chapter 41. In May 1990, the City repealed the 1981 version of the HCO and enacted a new version.

The HCO is wholly separate from the City's zoning laws, which independently restrict conversion of residential property in some zoning districts. HCO § 41.13. In 1987, the Planning Commission and Zoning Administrator of the City of San Francisco adopted the North Beach Neighborhood Commercial District Zoning Ordinance ("NBNCD"), which changed the Planning Code applicable to tourist hotels in the zoning district in which the San Remo is located. *Planning Code §§ 722.1 et seq.* An owner seeking to convert a residential use to a tourist hotel is required to secure a conditional use permit from the City Planning Commission. *Id.* at § 722.55.

On January 21, 1993, after a public hearing, the Planning Commission approved plaintiffs' application for a conditional use permit upon satisfaction of the following conditions:

(1) Plaintiffs must mitigate the loss of the 62 residential hotel units by paying 40% of the cost of replacement housing, which equals $567,000;

(2) Plaintiffs must offer "lifetime leases" to existing long-term tenants; and

(3) Plaintiffs must seek and justify variances from the parking and floor area ratio limitations of the NBNCD Complaint ¶ 44.

Plaintiffs allege that they are informed and believe that the City has never imposed both a conditional payment of a replacement housing fee and the requirement of lifetime leases for existing tenants on a conditional use permit. Complaint ¶ 45.

On May 4, 1993, plaintiffs filed the instant action in U.S. District Court. At the same time, plaintiffs filed a petition for a writ of administrative mandate in state court challenging the decision of the City's Board of Permit Appeals requiring the San Remo to obtain a conditional use permit to convert to a permanent tourist hotel.[1]

In July 1993, plaintiffs moved for a preliminary injunction prohibiting the City from enforcing the HCO against San Remo. While this matter was pending, on September 9, 1993, Judge Vukasin declared the HCO unconstitutional on its face in *Golden Gate*. On September 16, 1993, based on the ruling

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[1] Following the Ninth Circuits decision in *San Remo v. City and County of San Francisco*, 145 F.3d 1095, as discussed below, San Remo amended its state court action to assert facial and as-applied takings claims.

in *Golden Gate*, Judge Vukasin granted plaintiffs' preliminary injunction in the instant case. The Order enjoined the City from requiring compliance with any condition of approval or taking any steps to prohibit plaintiffs from using the San Remo as a commercial tourist hotel. The City filed a notice of appeal and an emergency motion for a stay of the preliminary injunction. The Ninth Circuit denied the motion for stay and the City thereafter abandoned its appeal.

On September 28, 1993, San Remo's case was assigned to this Court.

On January 24, 1994, San Remo filed a first amended complaint. Plaintiffs' amended complaint challenged the constitutionality of the HCO and the validity of the replacement housing condition in the conditional use permit.

Beginning in March 1994, subsequent developments in the courts eroded the basis for the preliminary injunction granted to San Remo. On March 18, 1994, the Ninth Circuit vacated, reversed, and remanded the decision in *Golden Gate* for a determination as to whether appellants' complaint was time-barred under the applicable statute of limitations. *See Golden Gate Hotel Ass'n. v. City and County of San Francisco*, 18 F.3d 1482 (9th Cir. 1994). On remand, *Golden Gate* was assigned to this court.

On remand, in *Golden Gate*, this Court entered judgment for the City, finding the action time-barred by the applicable statute of limitations and thus dismissing the case. *See Golden Gate Hotel Ass'n. v. City & County of San Francisco*, 1994 U.S. Dist LEXIS 11313 (N.D. Cal. Aug. 2, 1994). On appeal, the Ninth Circuit affirmed this district court's order. *See Golden Gate Hotel Ass'n, v. City and County of San*

Francisco, 76 F. 3d 386 (Table) (9th Cir. 1996), *cert denied*, 519 U.S. 808 (1996).

At the same time as *Golden Gate*, other cases challenging the HCO and related to *Golden Gate* were also assigned to this Court. In addition to the related case of *San Remo*, this Court was assigned *Harsch Investment Co v. City & County of San Francisco*, *Djavahari v. City & County of San Francisco*, *Tsang v. Superior Court of San Francisco*, and *Sparks v. City and County of San Francisco.*[2]

In *Harsch Investment Corp. v. City and County of San Francisco*, plaintiff alleged virtually the same claims as San Remo, and was represented by the same counsel. On June 21, 1994, this Court denied a temporary restraining order. The Court held, In part, that the HCO is not facially unconstitutional because it clearly serves a legitimate government interest and does not deny all economically viable use of the property. *Harsch Investment Corp. v. City and County of San Francisco*, C-94-0629-DLJ ("TRO Order"), at 4.

In *Djavahari v. City and County of San Francisco*, the Court dismissed a similar challenge to the HCO as moot, when Plaintiff sold the subject of the action, his residential hotel. *See Djavahari v. City. & County of San Francisco*, 1994 U.S. Dist. LEXIS 2546.

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[2] This Court denied a related case motion in *Kardosh v. City and County of San Francisco* on March 8, 1994. On July 1, 1994, Senior Judge William Orrick granted defendants' motion to dismiss the complaint.

Tsang v. City and County of San Francisco was assigned to this Court on September 28, 1993. The case had been filed in the U.S. District Court after the Supreme Court of California denied petition for review of the Appellate Court's decision in favor of defendant. *Tsang v. Superior Court of San Francisco*, 1991 Cal. LEXIS 527. On March 10, 1995, the Court denied plaintiff's motion for a preliminary injunction enjoining the City's enforcement of the HCO and granted summary judgment to the City. C-91-4360- DLJ. The Court found plaintiff's facial challenge time-barred, as-applied challenge not ripe, and substantive due process claim insufficient on the merits.

In *Sparks v. City and County of San Francisco*, plaintiffs, owners of the Pacific Bay Inn, challenged the constitutionality of the replacement housing fee and attorneys fee requirements of the HCO under the Takings Clause of the Fifth Amendment and as violating their rights to procedural and substantive due process. C 94-2398-DLJ. This case was filed in federal court after the plaintiffs were involved in two different state court actions regarding the HCO, where they unsuccessfully raised the unconstitutionality of the HCO as an affirmative defense. The City opposed the motion on the grounds that the statute of limitations had run, principles of res judicata, plaintiffs' as-applied challenges were not ripe, and the Ordinance reasonably relates to legitimate public purposes, thus passing constitutional muster. In May 1995, the Court approved a stipulated action by the parties that the case would be dismissed with prejudice.

Along with the cases in this Court, California state courts were also reviewing similar challenges to the HCO.[3] For example, in *Lambert v. City & County of San Francisco*, hotel owners challenged the City's denial of a conditional use permit under the HCO as unlawful takings. *See Lambert v. City & of San Francisco*, 57 Cal.App.4th 1172, 1177 (1997). The Superior Court held that the denial of the permit was not a takings, and granted summary judgment to the City. *Id.* The California Court of Appeals affirmed this result. It held that the HCO, as well as the denial of a conditional use permit, passed constitutional muster and did not effectuate a takings. *Id.* at 1180. When reaching its decision, the Court discussed how the applicable standard of review for the City's decision was not the strict scrutiny standard of review stated in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), but a more deferential level of review. *Id.* at 1181. The Supreme Court of California denied review. *Lambert v. City & County of San Francisco*, 981 P.2d 41 (Cal. 1999), *cert denied, Lambert v. City & County of San Francisco*, 529 U.S. 1045 (2000).

With the related cases holding the HCO constitutional in the backdrop, the Court continued to review San Remo's case. On August 26, 1996, the Court dissolved the preliminary injunction and granted summary judgment to the City. The Court held: (1) plaintiffs' facial takings claim was barred by the applicable one-year statute of limitations, and there was no basis for applying equitable tolling; (2) plaintiffs' as-applied takings claim was not ripe, and thus the Court lacked subject matter jurisdiction; (3) plaintiff's procedural and substantive due process claims were

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[3] Many of the decisions by the California courts are unpublished.

insufficient on the merits; (4) plaintiff's pendant state law claims were insufficient on the merits; and (5) plaintiffs' request for leave to amend to add an equal protection claim was denied as futile, because their state law action for mandamus review was still pending.

On appeal, the Ninth Circuit affirmed in part and reversed in part. *San Remo v. City and County of San Francisco*, 145 F.3d 1095 (9th Cir. 1998). The Circuit Court held that San Remo's as-applied takings claim was not ripe because an inverse condemnation action had not been pursued in state court. *Id.* at 1102 (citing *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)). The Court then invoked *Pullman* abstention with regard to San Remo's facial takings challenge, staying further proceedings pending San Remo's litigation of their state claims. *Id.* at 1105. *Pullman* abstention is an equitable doctrine that allows federal courts to refrain from deciding sensitive federal constitutional questions when state law issues may moot or narrow the constitutional questions. *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095,1104 (9th Cir. 1998). Pullman abstention is appropriate when: (1) the federal Plaintiff's complaint requires resolution of a sensitive question of federal constitutional law; (2) the constitutional question could be mooted or narrowed by a definitive ruling on the state law issues; and (3) the possibly determinative issue of state law is unclear. *Id.* Once Pullman abstention is invoked by a federal court, the federal plaintiff must then seek a definitive ruling in the state courts on the state law questions before returning to federal court. *Id.* San Remo then amended their state court petition for writ of administrative mandate to add facial and as applied takings claims.

In state court, plaintiffs challenged the administrative determination that they needed a conditional use permit by a petition for writ of administrative mandate. They also challenged the $567,000 fee by paying it under protest and asserting a refund claim under the Mitigation Fee Act. *California Government Code §§ 66000 et seq*. Plaintiffs alleged that the City's legislative enactments and administrative actions that resulted in the $567,000 fee was a takings without just compensation. They alleged both a facial and as-applied challenge to the HCO and all of the City's legislative enactments and administrative actions that resulted in the imposition of the $567,000 fee.

Plaintiffs' state court complaint presented their state law claims, but they explicitly reserved their right to litigate their federal claims in federal court by filing an *England* reservation. *England v. Louisiana State Bd. of Medical Examiners*, 375 U S. 411 (1964). When a federal court abstains from a case and compels a litigant to submit his entire case to state court, the litigant is not compelled to litigate his federal claims in state court. Through an *England* reservation, a party can preserve his right under the abstention doctrine to return to District Court by informing the state courts that he so intends, should the state courts hold against him on the question of state law. *England*, 375 U.S. at 420.

Notwithstanding the reservation, the California Supreme Court discussed and applied federal law throughout the decision. On March 4, 2002, the California Supreme Court issued its decision in favor of the City on all issues. *San Remo v. City and County of San Francisco* ("San Remo II"), 27 Cal.4th 643 (2002). The California Supreme Court affirmed the decision by the state trial court to sustain the City's demurrer to the plaintiffs' takings claims to the HCO and all

administrative decisions, including the actions pursuant to the Planning Code.

On June 4, 2002, San Remo filed their Amended Complaint in this Court. They sought to litigate their federal takings claims. More specifically, they requested: (1) a judicial declaration by this Court that the replacement housing provisions of the HCO and the conditional use authorization requirements of the Zoning Ordinance, separately and in concert with each other, whether facially or as-applied to plaintiffs, violate their rights to Due Process under the Fifth and Fourteenth Amendments to the United States Constitution and that those provisions be declared invalid and unenforceable; (2) an award of damages in the sum of $567,000 plus interest; (3) an award of costs and attorneys fees as permitted by law; and (4) further relief as the Court deemed just and proper.

On October 15, 2002, this Court Ordered that:

1. Both plaintiffs' facial and as-applied federal takings claims with respect to the HCO and to the conditional use permit under the Planning Code must be considered by the Court.

2. Plaintiffs' facial takings claim to the HCO is time barred.

3. Plaintiffs' facial takings claim to the HCO is additionally barred under the doctrine of issue preclusion.

4. Plaintiffs failed to properly allege an as-applied takings claim to the HCO. However, if properly

alleged, an as-applied takings challenge to the HCO is time-barred.

5. Plaintiffs' facial takings claim to the Planning Code is time-barred.

6. Plaintiffs' failed to properly allege an as-applied takings claim to the Planning Code. However, if properly alleged, an as-applied takings claim to the Planning Code is not time-barred.

7. Plaintiff is granted leave to amend to allege an as-applied takings claim to the Planning Code.

On November 14, 2002, plaintiffs filed a Third Amended Complaint. They request: (1) a judicial declaration that the replacement housing provisions of the Hotel Ordinance and the conditional use authorization requirements of the Zoning Ordinance, whether facially or as applied, violate plaintiffs' right to due process under the Fifth and Fourteenth Amendments to the United States Constitution; (2) an award of damages of $567,000 plus interest; (3) an award of costs and attorneys' fees as permitted by law; and (4) further relief as the Court deems just and proper.

For a more detailed description of the factual background, the parties are referred to this Court's October 15, 2002 Order ("October 2002 Order") in *San Remo Hotel et. al. v. City and County of San Francisco et. al.*, C 93-1644-DLJ.

B. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a district Court must dismiss a complaint if it fails to state a claim upon which relief can be granted. When deciding a Rule 12(b)(6)

motion to dismiss, the Court must take all allegations of material fact as true and construe them, and all reasonable inferences therefrom, in the light most favorable to the nonmoving party. *See Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998); *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). The complaint should not be dismissed unless the complainant can prove no set of facts in support of his claim that would entitle him to relief. *Symington*, 51 F.3d at 1484. Even if the face of the pleadings suggests that the chance of recovery is remote, the Court must allow plaintiffs to develop the case at this stage of the proceedings. *United States v. City of Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981).

If the Court chooses to dismiss the complaint, it must then decide whether to grant leave to amend. In general, leave to amend is only denied if it is clear that amendment would be futile and "that the deficiencies of the complaint could not be cured by amendment." *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987) (quoting *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980) (per curium)).

When the complainant has attached various exhibits to the complaint, those exhibits may be considered in determining whether dismissal is proper without converting the motion to one for summary judgment, *Id.* (citing *Cooper v. Bell*, 628 F.2d 1208, 1210 n.10 (9th Cir. 1980).

II. DISCUSSION

On October 15, 2002, the Court ruled on the City's Motion to Dismiss San Remo's Amended Complaint. San Remo now prays in their Third Amended Complaint for the same judicial relief that they had requested in their Amended Complaint. Based on the October 2002 Order, San Remo was

only given leave to amend its as-applied takings claim to the Planning Code. Accordingly, the only allegation properly before the Court is the as-applied takings challenge to the Planning Code.

A. As-Applied Takings Claim

The City argues that San Remo's as-applied takings challenge is subject to collateral estoppel because the California Supreme Court adjudicated the same issue in favor of the City. In addition, the City argues that San Remo's as-applied takings challenge fails on the merits.

In its Opposition, in addition to arguing why their claim does not fail on the merits, San Remo argues several reasons why their claim should not be dismissed.

First, San Remo argues that collateral estoppel does not apply because: (1) the Ninth Circuit ordered this Court to abstain under *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941); and (2) San Remo invoked *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964), thus reserving their federal claims for federal court. San Remo argues that they only presented their federal claims to the state courts so that state laws could be construed in light of their federal claims. Moreover, they argue that the California Supreme Court respected their *England* reservation and did not decide their federal claims.

Second, San Remo argues that even if this Court finds that *England* does not apply, there is no collateral estoppel under California state law, and so this Court should not apply the doctrine of issue preclusion. In support of this argument, San Remo argues that (1) California courts do not apply collateral

estoppel to legal issues, but only to factual issues; (2) the California Supreme Court did not decide its federal claims; (3) under California law, a ruling on a demurrer is given only limited effect in subsequent proceedings; and, (4) California courts do not apply collateral estoppel to a prior decision under a different body of law (and so this Court should not apply the doctrine because the California decision was based on a different body of law- state law).

Finally, San Remo argues that the Court should not apply issue preclusion because the California Supreme Court applied an extremely deferential "rational basis" level of review instead of the "required" heightened *Nollan* and *Dolan* standard *See Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

Below is a discussion of the application of collateral estoppel through the doctrine of issue preclusion. However, before addressing the doctrinal issue, the Court discusses whether San Remo properly pled an as-applied takings challenge to the Planning Code.

1. Pleadings

The proper categorization of San Remo's claim as facial or as-applied is important, amongst other things, each raises different ripeness and statute of limitations issues. *San Remo II*, 998 F.2d at 686.

A facial challenge to the constitutional validity of a statute considers the text of the legislation itself. In contrast, an as-applied challenge "contemplates analysis of the facts of a particular case or cases to determine the circumstances in which the statute or ordinance has been applied and to

consider whether in those particular circumstances the application deprived the individual to whom it was applied of a protected right." *Tobe v. City of Santa Ana*, 9 Cal.4th 1069, 1084 (1995).

In the context of a constitutional takings claim, a facial challenge involves "a claim that the mere enactment of a statute constitutes a takings," while an as-applied challenge involves "a claim that the particular impact of a government action on a specific piece of property requires the payment of just compensation." *Keystone Bituminous Coal Ass'n*, 480 U.S. at 494, (1987).

In order to assert an as-applied challenge, plaintiffs must allege that a particular ordinance is applied differently to their particular property than to other similarly situated property owners. For example, in *Travis v. County of Santa Cruz*, the petitioner argued that the County exceeded its authority by imposing certain occupancy restrictions, rent controls and deed restrictions as mandatory conditions upon granting development of specified property. *Travis*, 122 Cal.Rptr.2d 713 (2002). The Court held that the petitioners failed to assert an as-applied takings challenge, despite their arguments to the contrary. *Id.* at 721. It reasoned that because the petitioners did not "clearly allege" that any of the imposed conditions differed in any way from conditions imposed on other applicants for permits, or that the Ordinance had a disparate fiscal effect on them as compared to other similarly situated proper owners, their claim was only facial. *Id.*;*Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal.4th 952, 961, (1999).

Similarly, in *Levald*, the Ninth Circuit found that the plaintiffs failed to "clearly" allege an as-applied takings challenge. *Levald*, 998 F2d at 686. The Court reasoned that the payment required in the statute at issue, though the

amount might vary amongst property owners, arose not based on a particular application of the statute, but solely from the existence of the statute itself. *Id.*

Turning to this case, the Court finds that San Remo has properly pled an as-applied takings challenge to the Planning Code. In its Third Amended Complaint, San Remo alleges essential facts that were absent from its previous Complaint. San Remo added paragraphs 39-41, 45 and 46. Most notable is paragraph 45, in which plaintiffs allege: "Plaintiffs are informed and believe and therefore allege that the City has never imposed both a condition of payment of a replacement housing fee and a requirement of lifetime leases for existing tenants on a conditional use permit for the conversion of residential hotels rooms to tourist use."

At this stage, the Court must accept the allegations of the Complaint as true. As a result, San Remo has properly alleged an as-applied challenge to the Planning Code. The issue now becomes whether or not this Court should apply the doctrine of issue preclusion. As discussed below, the Court finds that the doctrine applies and bars litigation of San Remo's Third Amended Complaint.

2. The Doctrine of Issue Preclusion Applies

As already noted, San Remo argues that the Court should not apply issue preclusion because: (1) *Pullman* abstention and their *England* reservation; (2) California courts would not apply the doctrine in this situation; and, (3) the California Supreme Court applied an extremely deferential "rational basis" level of review instead of the "required" heightened *Nollan* and *Dolan* standard. Each issue is addressed in turn.

a. *Pullman* Abstention and the *England* Reservation

Remo argues that collateral estoppel does not apply because: (1) the Ninth Circuit ordered this Court to abstain under *Pullman*; and (2) San Remo reserved federal claims for federal court through an *England* reservation. In this Court's October 2002 Order, the Court thoroughly analyzed the interplay of *Pullman* abstention and San Remo's *England* reservation. After a full discussion of the applicable law, the Court concluded that neither *Pullman, England* nor the other decisions cited to by San Remo in support of this argument bar the Court from applying collateral estoppel through the doctrine of issue preclusion in this. case. *See October 2002 Order*, p 48-52. For the same reasons, as discussed below, the doctrine of issue preclusion is applicable and plaintiffs are precluded from re-litigating their claims in federal court.

The Ninth Circuit held in *Dodd II* that a previous *England* reservation of a federal takings claims does not prevent operation of the issue preclusion doctrine. *Dodd II*, 136 F.3d 1219 (1998) In *Dodd II*, Dodd filed a suit under *section 1983* in federal court alleging a takings in violation of the Fifth and Fourteenth Amendments. The District Court dismissed the claim as unripe. The Dodds appealed. However, because the Oregon Supreme Court decided the case during the pendency of the appeal, the Ninth Circuit determined that the federal issue was ripe and remanded. When arguing before the Oregon state courts, the Dodds explicitly asked the Oregon courts to refrain from addressing the takings issue under federal law by making an *England* reservation. On remand, the District Court determined that, despite the Dodd's *England* reservation, their federal claims were barred under the doctrine of issue preclusion.

The Ninth Circuit upheld this result. The Ninth Circuit stated "[n]or does the Dodd's previous reservation of this federal takings claim under the doctrine of *England* prevent operation of the issue preclusion doctrine." *Id*. at 1227. The Court found that, "to the extent a party fully litigates a necessary issue in the course of a state proceeding that is identical to an issue before the federal court, they are precluded from taking a second bite of the apple." *Id*. The Court did note, however, that a party can effectively reserve claims for federal court under the *England* doctrine. *Id* at 1227 (emphasis added).

In *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992), homeowners brought a civil rights action against the Tampa airport based on claim that flights over their property constituted a takings. The homeowners filed suit in Manatee County Circuit Court, raising only state claims. After losing in state court, the homeowners filed suit in federal court under federal law. The district court dismissed the suit on issue preclusion principles. The Eleventh Circuit upheld this result. In doing so, the Eleventh Circuit recognized the jurisdictional problem created by the interplay of *28 U.S.C. 1738*[4] and the Supreme Court's holding in *Williamson County*[5]. On the one hand, *Williamson County*

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[4] Pursuant to *28 U S.C. 1738*, "... Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

[5] In *Williamson County*, the Supreme Court held that a takings claim is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding

requires potential federal court plaintiffs to pursue any available state court remedy that might lead to just compensation. On the other hand, if a litigant brings a takings claim under the relevant state procedure, he runs the risk of being barred from returning to federal court. *Id.* at 1301. The Court also recognized that the Supreme Court has not made a definitive ruling on the interplay of this case law. *Id.*; *Allen v. McCurry*, 449 U.S. 90, 101, 103-04 (1980).

The Eleventh circuit resolved the dilemma by finding that a litigant involuntarily in state court, such as under *Williamson County*, can avoid issue preclusion through a *Jennings* reservation. *Jennings v. Caddo Parish School Bd.*, 531 F.2d 1331 (5th Cir. 1976). A *Jennings* reservation allows a plaintiff in state court to reserve the right to bring federal claims in federal court should the state court find adversely to plaintiffs. When Coming to this conclusion, however, the Court noted how it questioned the continued validity of *Jennings*, but was reluctant to overrule the case because it was "too late in the day" to do so. *Id.* It also stated how "If a *Jennings*-type reservation is not available in *section1983* actions rising takings claims, 'plaintiffs could never obtain a hearing on their federal constitutional claims in federal court'" *Id.* at 1307, quoting *Henry v. First Nat'l Bank of Clarksdale*, 595 F.2d 291, 298 n. 1 (5th Cir. 1979). There is no *Jennings* reservation in this case.

San Remo argues that the *Dodd I* and *Fields* cases are inapplicable, though both involved and discussed an *England* reservation, because neither involved *Pullman* abstention. The Court rejects this argument and find that both apply and

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the application of the regulations, to the property at issue. *Williamson County*, 473 U.S. at 186.

support application of issue preclusion in this case. Neither decision is dependent on the fact that there was no *Pullman* abstention. Instead, both stress how litigants in state court, even if they are there involuntarily and invoke an *England* reservation, could be barred from later litigation in federal court by the doctrine of issue preclusion.

In addition to the reasoning of the *Dodd II* case, the City argues that issue preclusion should apply because San Remo voluntarily litigated their claims in state courts. It argues that the whole rationale for an *England* reservation and San Remo's argument as to why issue preclusion should not apply is inapplicable in ths case based on San Remo's voluntary decision to litigate in state court. As such, it argues that the failure of this Court to apply the doctrine would lead to the type of forum shopping that issue preclusion is designed to prevent.

San Remo argues that a plaintiff should not be required "without his consent and through no fault of his own, to accept instead a state's court's determination of [its federal] claims." However, in the Ninth Circuit case, it was plaintiffs who urged the Court to apply *Pullman* abstention. As stated in the Ninth Circuit decision: "Ironically, it is Field who urge us to abstain under *Pullman*. Normally, of course, *Pullman* abstention is invoked by the defendant, not only because it is the plaintiffs who initially chose the federal forum (and thus presumably wants it), but because *Pullman* abstention tends to delay resolution of the plaintiff's constitutional claims. Unsurprisingly, the City views Field's request for abstention as an outrageous act of chutzpah, and argues that Field should be stuck with the federal forum he chose. Although we have some sympathy for the City's position, we agree with Field that a plaintiffs may raise *Pullman* abstention just as a

defendant may, and he may do so for the first time on appeal." *San Remo*, 145 F.3d at 1104 05.

The Court agrees with the City that San Remo voluntarily litigated its claims in state court. As discussed in the case before the Ninth Circuit, it was plaintiffs who urged the court to abstain under *Pullman*. *See San Remo I*, 145 F.3d at 1104-05. For this reason, as well as the reasoning discussed above, plaintiffs are precluded from re-litigating their claims in federal court.

b. California Courts and Collateral Estoppel

San Remo argues that California courts would not apply collateral estoppel in this case for four reasons. San Remo made the same arguments when its Amended Compliant was before the Court. In the October 2002 Order, the Court thoroughly analyzed and rejected these arguments. For the same reasons, as discussed below, the Court finds that none of these arguments bar the Court from applying the doctrine of issue preclusion.

First, San Remo argues that collateral estoppel should not apply because California courts only apply the doctrine to factual and not legal issues.

The Court rejects San Remo's argument. California courts have consistently applied collateral estoppel to questions of law. *See, e.g., Rutherford v. State of California*, 233 Cal. 781 (1987); *United States Fire Insurance Company v. Hans F. Johansen*, 270 Cal.App.2d 824 (1969); *Pacific Maritime Assn. v. California Unemp. Ins. Appeals Board*, 236 Cal.App.2d 325, 334 (1965). When a question of law essential to a judgment is actually litigated and determined by a valid and final judgment, it is conclusive on a later action

that arises out of the same subject matter or transaction, unless injustice would result. *Johansen*, 270 Cal.App.2d at 834-35. In this case, San Remo does not argue, nor would there be, any injustice from applying issue preclusion. The issues of law decided by the state Supreme Court arise out of the exact same transaction at issue in this case.

Second, San Remo argues that California courts give only limited effect in subsequent proceedings to a ruling on a demurrer.

The Court rejects this argument. In California collateral estoppel applies when an issue is actually litigated and determined on a motion to dismiss for failure to state a claim, a motion for a directed verdict, or their equivalents. *Barker v. Hill*, 191 C.A.3d 221 (1987). Courts do not make a distinction when applying the doctrine based on the form of the ruling. In fact, it is not even necessary that an "exhaustive adversarial hearing" is conducted in order to preclude re litigation. *Briggs v. Lawrence*, 230 C.A.3d 605, 611 (1991).

Third, San Remo argues that their federal takings claim is not barred because they are asserting "a different- albeit closely related- cause of action."

The Court also rejects this argument. California courts will not apply collateral estoppel if the second action concerns new facts or circumstances. *Oro Fino Old Mining Corp. v. El Dorado*, 225 C.A.3d 872, 878 However, the courts consistently apply it for issues raised, even when some factual matters or legal arguments which could have been presented were not. *Id*. This is true even if the unraised arguments or facts would have produced an opposite result if they had been raised. *Mattz v. Superior Court*, 250 Cal.Rptr. 278 (1988). In this case, San Remo is arguing a violation of the Takings

Clause based on identical facts and circumstances argued before the state courts, San Remo has not alleged any new changes since the California Supreme Court decision on March 4, 2002. Even assuming San Remo seeks to argue additional facts and arguments that it failed to argue before the state court, collateral estoppel still applies.

Finally, San Remo contends that the "interpretation of a written document- without considering any extrinsic evidence" in a first action is not given preclusive effect in a second action, citing *Johansen*, 270 Cal.App.2d 824 (1969). However, the *Johansen* case does not stand for such a proposition. In *Johansen*, the Court invoked the exception to collateral estoppel because, based on the individual circumstances of the case, application of the doctrine would result in "grave injustice." *Id*. at 834. Neither it, nor other California court decisions, invoke the rule urged by San Remo.

c. Level of Review

San Remo argues that this Court should not apply the doctrine of issue preclusion because the California Supreme Court applied an extremely deferential "rational basis" level of review instead of the "required" heightened *Nollan* and *Dolan* standard. *See Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

In the October 2002, the Court throughly analyzed, this issue and found that the heightened *Nollan* and *Dolan* standards do not apply to this case. For the same reasons as discussed below, the Court finds that *Nollan* and *Dolan* do no not prevent the Court from applying the doctrine of issue preclusion.

As discussed in the October 2002 Order, even if this Court were free to disregard the findings of the California Supreme Court, the Court finds that the heightened *Nollan* and *Dolan* standards do not apply to this case.

In *Nollan*, the Supreme Court was presented with a case where the California Coastal Commission required, as a condition to approval of a rebuilding permit, that owners provide the public an easement to pass across a portion of their property. After recognizing how a land use regulation does not effect a takings if it substantially advances legitimate state interests and does not deny an owner economically viable use of his land, the Court found that the Commissioner's condition did not meet "even the most untailored" standard of means-end scrutiny, and thus required the payment of just compensation. *Nollan*, 483 U.S. at 834, 838, *citing Agins v. City of Tiburon*, 447 U.S. 255 (1980). While the Court did not elucidate with any precision the required means-end fit, it did caution that judicial scrutiny would be searching when "the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective. *Id*. at 841.

Despite the fact that the standard articulated in *Nollan* was not explicitly conditioned on the taking of a possessory land interest, after *Nollan*, the Ninth Circuit decided in *Commercial Builders* that the correct standard for analyzing a regulation which does not exact a possessory land interest is the more permissive rational relationship test found in its earlier decision, *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983). *Commercial Builders*, 941 F.2d 872, 874 (9thCir. 1991).

In *Commercial Builders*, appellants challenged an Ordinance by the City of Sacramento to help expand available low income housing. The Ordinance conditioned certain types of nonresidential building permits upon the payment of a fee intended to offset the burdens on the city caused by low-income workers who moved there to fill jobs created by the project in question. The Ninth Circuit held that the Ordinance in question did not work an unconstitutional takings because it was reasonably related to its stated purpose. *Id.* at 874-875. The Court rejected appellants argument that *Nollan* imposes a more stringent level of review for ordinances that place conditions on development; it further rejected the argument that the Ordinance must substantially advance its stated purpose. *Id.* In reaching its decision, the Ninth Circuit noted how none of the Circuits that considered the constitutionality of ordinances placing burdens on land use after *Nollan* interpreted the case as changing the level of scrutiny to be applied to regulations that do not constitute a physical encroachment on land. *Id.* citing *St. Bartholomew's Church v. City of New York*, 914 F 2d. 348, 357 n.6 (2d Cir.1990), *cert. denied sub nom. Committee to Oppose Sale of St. Bartholomew's Church v. Rector*, 499 U.S. 905 (1991); *Adolph v. Federal Emergency Management Agency*, 854 F.2d 732, 737 (5th Cir.1988); *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172, 178 (4th Cir.1988). The Court also rejected appellant's argument that the fee represented a transfer of property, and therefore more closely resembled a physical taking of property. The Court reasoned "Under appellants' theory, however, compensation would be required for every fee; therefore, every fee would be unconstitutional. We see no valid basis for such a rule." *Id.* at 875.

The Supreme Court's more recent decision, *Dolan v. City of Tigard*, 114 S.Ct. 2309, 2316 (1994), does not undercut

the explicit distinction drawn by the Ninth Circuit in *Commercial Builders*. Thus, Ninth Circuit precedent imposes a deferential level of review for ordinances that do not involve a physical taking.

In *Dolan*, the Supreme Court was presented with a situation similar to that in *Nollan*, where a government agency conditioned a development permit on dedication of a portion of the applicant's land. As such, the Court elaborated on the question it had reserved in *Nollan* namely the "required degree of connection between the exactions and the projected impact of the proposed development." *Dolan,* 512 U S at 386. It discussed that while no "precise mathematical calculation is required," a standard of "rough proportionality best encapsulates what we hold to be the requirement of the Fifth Amendment" *Id.* at 391. However, when elaborating and applying this "heightened scrutiny," the Court distinguished both the *Dolan* and *Nollan* cases from "other land use cases that involve essentially legislative determinations classifying entire areas of the city" or when "conditions imposed are simply a limitation on the use petitioner might make of her own parcel," where a more deferential standard is utilized. *Id.* at 385. It noted how, when evaluating generally applicable zoning regulations, "the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights." *Id.* at 391fn. 8, *citing Village of Euclid v Ambler Realty Co.*, 272 U.S. 365 (1926).

In this case, as discussed by the California Supreme Court, the HCO does not provide City staff or administrative bodies with discretion as to the imposition or size of the housing replacement fee, and it applies the Ordinance without discretion or discrimination to every residential hotel in the city. *San Remo II*, 27 Cal 4th at 668. The City did not require

dedication of any of Remo's property as in *Nollan* or *Dolan*, nor did it require compliance with the statute in an arbitrary manner. As such, the heightened *Nollan* and *Dolan* standard do not apply in this case. The California Supreme Court utilized an appropriate level of scrutiny.

3. The Doctrine of Issue Preclusion

The collateral estoppel effects of a former adjudication are collectively referred to by most commentators as the doctrine of "res judicata." *See* Restatement (Second) of Judgments, Introductory Note before ch. 3 (1982); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4402 (1981). Collateral estoppel or "res judicata" is often analyzed further, to consist of two preclusion concepts: "issue preclusion" and "claim preclusion." *Migra v. Warren City School Dist. Bd of Educ.*, 465 U.S. 75, 77 n. 1 (1984). "Claim preclusion" refers to the preclusive effect of a judgment in foreclosing re-litigation of claims that were raised or should have been raised in earlier litigation. *Id.* "Issue preclusion" refers to the preclusive effect of a judgment in foreclosing re-litigation of issues that have been actually and necessarily decided in earlier litigation. *Id.*

Under the doctrine of claims preclusion, "[A] valid final adjudication of a claim precludes a second action on that claim or any part of it." *Baker ex rel. Thomas v. General Motors Corp.*, 522 U.S. 222, 233 n. 5 (1998).

Under the doctrine of issue preclusion, a valid and final determination in one proceeding of a necessary factual or legal issue may not be re-litigated in a subsequent proceeding involving a party to the prior action. *See Dodd v. Hood River County* ("Dodd II"), 136 F.3d 1219, 1224 (9th Cir. 1998).

Pursuant to the Full Faith and Credit Act, 28 U.S.C. § 1738, federal courts must "give a state court judgment the same preclusive effect as would be given to that judgment under the law of the state in which the judgment was rendered." *Migra v. Warren School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). Therefore, California law on issue preclusion dictates our analysis. *Dodd II*,136 F.3d at 1225.

San Remo alleges that the replacement housing fee and identical issue raised before the California Supreme Court and so the doctrine of issue preclusion, and not claims preclusion, is applicable in this case. Nonetheless if San Remo was asserting a different claim and the doctrine of claims preclusion did apply, their claim would still be barred. Under California law, collateral estoppel applies both to claims actually litigated in a prior proceeding, and, as the case would be, to claims which could have been litigated *See Patrick Media Group, Inc. v. California Coastal Com.*, 9 Cal.App.4th 592, 617 (1992).

a. California Law

California Courts apply the doctrine of collateral estoppel to attempts to re-litigate the same issue in a later action. *Griset v. Fair Political Practices Com.*, 25 Cal.4th 688, 701-02 (2001). Collateral estoppel bars re-litigation of an issue decided at a previous proceeding if: (1) the issue decided in the prior case is identical with the one now presented; (2) there was a final judgment on the merits in the prior case; and, (3) the party to be estopped was a party to the prior adjudication. *Stolz v. Bank of America*, 15 Cal. 4th 127, 222 (1993). Accordingly, if the substantive laws of takings in California and federal courts are coextensive, issue preclusion applies to any takings issues that were decided in California state courts that are later brought in federal court. *Dodd v.*

Hood River County ("Dodd I"), 59 F.3d 852, 861 (9th Cir. 1995).

Under the takings clause of the California Constitution (art. I, § 19), "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into Court for, the owner." The federal takings clause (U.S. Const., 5th Amend.) provides: "nor shall private property be taken for public use without just compensation." Aside from protecting "a somewhat broader range of property values" than the corresponding federal provision, California construes both the federal and state clauses congruently *San Remo II*, 27 Cal.4th at 664; *Hensler v. City of Glendale*, 8 Cal.4th 1, 9, fn. 4 (1994). Thus, because the substantive laws of takings in California and federal courts are coextensive, collateral estoppel applies through the doctrine of issue preclusion when the three-part California test is met.

b. Application of the Three Part Test

The Court finds that San Remo's claim is barred by collateral estoppel through the doctrine of issue preclusion. All three-parts of the test for applying the doctrine of issue preclusion are satisfied.

One, the Court finds that the issues decided in the prior case are identical to the issues presented in the instant case. In state court, San Remo "alleged both a facial challenge to the Hotel Ordinance and an as-applied challenge to all of the City's legislative enactments (which includes both: the HCO and the Planning Code) and administrative actions that resulted in imposition of the $567,000 fee" (which includes the conditional use permit issued to San Remo) San Remo's Memorandum in Opposition to Dismiss ("Opposition"), page

9. In state court, San Remo challenged both the imposition of the fee and the life time lease requirement *See e.g., San Remo*, 27 Cal.4th at 648, 678. San Remo is now raising the identical issues in their Third Amended Complaint. They are again alleging an as-applied takings challenge to the Planning Code based on the fee and life-time lease requirements imposed in the conditional use permit. As a result, the first prong of the three-part test is satisfied.

Second, the Court finds that there was a final judgment on the merits in the prior case. The final judgment on the merits resolved the identical issues now before the Court. The California Supreme Court sustained the City's demurrer to the plaintiffs' takings claims. As a result, the Court necessarily decided San Remo's as-applied Takings Challenge to the Planning Code based on the imposition of the fee and life-time lease requirement. As a result, the second prong of the three-part test is satisfied.

Finally, the party to be estopped was a party to the prior adjudication. San Remo was a party to the California Supreme Court case. As a result, the third prong of the three-part test is satisfied and San Remo is precluded from litigating its suit in federal court.

B. San Remo's Claim on the Merits

The City argues that even if the Court did not apply the doctrine of issue preclusion, it must dismiss San Remo's claim for failure to state a claim on the merits. Because the Court finds that San Remo's claims are precluded, the Court does not find it necessary to address this argument.

III. CONCLUSION

For the foregoing reasons, the Court hereby GRANTS defendants' motion to dismiss plaintiffs' Amended Complaint. On the circumstances presented here, it appears that any possible basis for the as-applied takings claim has been pleaded and that it would be futile to allow any further opportunity to amend. Accordingly, the dismissal of plaintiffs' Amended Complaint is without leave to amend.

Dated: April 16, 2003

/s/ _____
D. Lowell Jensen
United States District Judge

APPENDIX D

U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

No. C- 93-1644-DLJ

[Filed October 15, 2002]

SAN REMO HOTEL L.P,
THOMAS FIELD, ROBERT FIELD, AND
T&R INVESTMENT CORP.,
Plaintiffs,

v.

CITY AND COUNTY OF SAN FRANCISCO,
a Municipal Corporation, on behalf of the
DEPARTMENT OF CITY PLANNING,
CITY PLANNING COMMISSION,
AND BOARD OF SUPERVISORS,
Defendants.

ORDER

On September 6, 2002, the Court heard arguments on defendants' motion to dismiss plaintiffs' Amended Complaint. Andrew W. Schwartz appeared on behalf of defendants; Paul F. Utrecht and Andrew M. Zacks appeared on behalf of

plaintiffs ("San Remo"). R.S. Radford appeared on behalf of the Pacific Legal Foundation ("PLF") as amicus curiae. Having considered the arguments of counsel, the papers submitted, the applicable law, and the record in this case, the Court hereby GRANTS defendants' motion.

I. BACKGROUND

A. Factual Background and Procedural History

Plaintiffs, Thomas and Robert Field (the "Fields"), own and operate the San Remo Hotel, a 62-unit property in San Francisco. When plaintiffs ("San Remo") purchased the hotel in 1971, it was zoned commercial and there were no restrictions on tourist or commercial use of the property. Amended Complaint for Declaratory Relief and Damages, dated June 4, 2002 (the "Complaint") ¶ 9. Intending to operate the San Remo as a tourist hotel, plaintiffs expended more than $250,000 to make the repairs required to bring the San Remo into compliance with housing, building and fire codes governing commercial/tourist hotels. Complaint ¶ 10.

Plaintiffs allege that, after renovations were completed, the guest rooms at the San Remo have been rented primarily to transient and tourist guests on a commercial basis, with the majority of their rental business taking place during the summer months. Complaint ¶ 11. Every year from 1970 until the present, the City has licensed the San Remo as a tourist hotel. Complaint ¶ 11.

1. The 1981 Hotel Ordinance

In 1981, the City enacted the Residential Hotel Unit Conversion and Demolition Ordinance ("HCO"), which established certain conditions that owners would have to meet

when they sought to convert residential hotel units to nonresidential tourist use.[1] *San Francisco Admin. Code*, Chapter 41. A study by the Department of City Planning showed that between 1975 and 1979 almost 20% of the residential hotel units in the City were lost due to demolition and conversion, primarily to tourist use. *HCO* § 41.3 (d). The stated purpose of the HCO is "to benefit the general public by minimizing adverse impact on the housing supply and on displaced low-income, elderly and disabled persons resulting fromthe loss of residential hotel units through their conversion and demolition." *HCO* § 41.2.

Under the HCO, units can be converted from residential to nonresidential use only if the owner obtains a permit to convert. The City will grant a permit only if the property owner provides relocation assistance to hotel residents and replaces the residential hotel units being converted through one of the following methods: (1) constructing an equal number of replacement units, (2) rehabilitating an equal number of residential hotel units, or (3) contributing an 'in lieu' fee to the City's Residential Hotel Preservation Fund Account in the amount of 100 percent of the acquisition cost and 40 percent of the construction costs of the number of units converted. *HCO* §§ 41.12 and 41.13; *see also Bullock*, 221 Cal. App.3d at 1081. The 1981 Hotel Ordinance allowed unlimited tourist use of residential units during the summer months of May 1 to September 30. *HCO* § 41.16(a) (3) (b).

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[1] The HCO was originally enacted in 1979 as a "temporary moratorium." In 1981, a permanent HCO was enacted. *Bullock v. City and County of San Francisco*, 221 Cal. App. 3d 1072, 1080 (1990) (discussing history of the San Francisco Residential Hotel Unit Conversion and Demolition Ordinance).

The HCO defines a "residential unit" as a hotel "guest room" that was occupied by a "permanent resident" as of September 23, 1979. HCO § 41.4(b)(1). To determine the number of "residential units" existing as of September 23, 1979, a survey was sent to operators of hotels. After receiving the survey responses, the City certified the number of units that each property owner was required to maintain for residential use pursuant to the HCO. *See HCO* § 41.6.

The San Remo's survey questionnaire was sent to the hotel and answered by Jean Iribarren, who leased the hotel from plaintiffs. Complaint ¶ 21. Mr. Iribarren reported that the San Remo units were residential. According to plaintiffs, Mr. Iribarren did not speak fluent English and his response to the survey that all of the San Remo's rooms were occupied by residents was a false statement. Complaint ¶ 21. Plaintiffs claim they were not given notice that the City was conducting the survey, nor were they notified of Mr. Iribarren's responses. Complaint ¶ 22. A copy of the certificate of use was physically posted at the hotel in 1981.[2]

Based upon Mr. Iribarren's responses to the survey, the City issued a Certificate of Use authorizing the operation of 62 residential units and zero tourist units at the San Remo. Complaint ¶ 24. No appeal of the unit status determination was filed and the Certificate of Use became final. Complaint ¶ 22. Plaintiffs claim that they could not have filed an appeal because they had no notice of either the false declaration or the City's initial usage report. Complaint ¶ 22. They argue that they were unaware of the 1981 survey that established the

[2] Under the HCO, the City-issued certificate of use was required to be posted in the hotel lobby when issued in 1981. *HCO* § 41.6(d).

hotel's initial status, and that they did not know of the hotel's classification until 1983. However, they allege no facts in their complaint that indicate they were prevented by City action from learning of and participating in the survey and certification process. Moreover, under the HCO, the City-issued Certificate of Use, from which plaintiffs could have appealed, was required to be posted in the hotel lobby when issued in 1981. *HCO* § 41.6(d). Even when they took possession in 1983, plaintiffs made no effort to correct the allegedly incorrect designation. *San Remo II*, 27 Cal.4th at fn. 17. They waited until 1987 to even draw it to the City's attention by letter. *Id*.

2. The 1990 Hotel Ordinance

In May 1990, the City repealed the 1981 version of the HCO and enacted a new version. The 1990 HCO no longer allows unlimited summer tourist use of residential units. It allows 100% use of residential units for tourists during the summer, if specified conditions are met, but limits the use of residential units for tourists to 25% if those conditions are not met.[3] It also increased the replacement housing fee amount from 100% of the cost of an acquisition plus 40% of the costs of construction of a replacement unit to 100% of the cost of an acquisition plus 80% of the costs of construction of a

[3] "An owner is prohibited from renting more than 25% of the hotel's residential units for non-residential or tourist use from May 1st until September 30th unless the owner or operator can demonstrate that: (i) the requirements of 41.19 (a)(3) above are met, (ii) good-faith efforts were made to rent such units to perspective permanent residents at fair market value for comparable units and that such efforts failed and (iii) the owner and operator has not committed unlawful action as defined in this Chapter within 12 months prior to this request." HCO§ 41.9.

replacement unit. *HCO* § 41.13 (a)(4). This fee increase, however, was not imposed on the San Remo, as the 1990 HCO allowed certain owners, including the San Remo, to invoke the 40% replacement housing fee under the 1981 Ordinance rather than the new 80% fee. *HCO* § 41.13(d).

3. The North Beach Zoning Ordinance

The HCO is wholly separate from the City's zoning laws, which independently restrict conversion of residential property in some zoning districts. *HCO* § 41.13. The HCO explicitly provides in § 41.4(s): "Designation as a tourist unit under this Chapter shall not supersede any limitations on use pursuant to the Planning Code. An owner must therefore comply with applicable zoning restrictions in addition to the HCO." *HCO* § 41.4(s).

In 1987, the Planning Commission and Zoning Administrator of the City adopted the North Beach Neighborhood Commercial District Zoning Ordinance ("NBNCD"), which changed the Planning Code applicable to tourist hotels in the zoning district in which the San Remo is located. *Planning Code §§ 722.1 et seq.* An owner seeking to convert a residential use to a tourist hotel is required to secure a conditional use permit from the City Planning Commission. *Id.* at § 722.55. However, owners who establish a prior non-conforming commercial use are exempt from the conditional use permit requirement. Complaint ¶ 18.

Although enacted in 1987, the NBNCD classifies residential hotels based upon their actual use on September 23, 1979, the same date established for the HCO. Thus, although plaintiffs claim that the hotel was being used as a summer tourist hotel at the time the NBNCD was enacted, under the terms of the NBNCD, plaintiffs were required by

the City to obtain a conditional use permit to operate the San Remo as a tourist hotel.

4. Administrative Proceedings

In May 1990, plaintiffs filed an application under the HCO for a permit to convert the San Remo's 62 residential units to tourist use under the 1990 HCO. Complaint ¶ 23. Plaintiffs allege that the City refused to act on the application until 1997. *Id.*

After plaintiffs filed the conversion application, the Planning Department informed plaintiffs that the Zoning Ordinance defines the rooms at the San Remo as group housing units and therefore plaintiffs needed to obtain a conditional use permit under the Planning Code to convert their 62 group housing units into a tourist hotel. Complaint ¶ 24.

In July 1990, plaintiffs complied with the Planning Department's request and filed an application for a conditional use permit under protest. Complaint ¶ 26.

In June 1992, the plaintiffs invoked the protections of the Permit Streamlining Act (*California Government Code § 65920 et seq.*) to compel the City to act on its permit application. Complaint ¶ 26. On August 20, 1992, allegedly in direct response to plaintiffs' invocation of the Permit Streamlining Act, the City scheduled a public hearing on plaintiffs' application for a conditional use permit. Complaint ¶ 27.

On the day of the public hearing, the City Attorney informed plaintiffs that the Planning Commission did not have jurisdiction to adjudicate their claim. *Id.* It further advised

plaintiffs that only the City's Board of Permit Appeals ("BPA") could make any of the requested findings. As a result plaintiffs agreed to delay the Planning Commission hearing so the BPA could hear their claims. *Id*.

On September 9, 1992, the Zoning Administrator issued a written determination that the San Remo was not zoned for commercial use and needed a conditional use authorization in order to rent their units to tourists. Complaint ¶ 28.

On or about September 21, 1992, plaintiffs appealed the decision of the Zoning Administrator to the BPA, arguing that the Zoning Administrator improperly applied the relevant Planning Code provisions, and that the classification denied plaintiffs due process of law, equal protection, and constituted a takings without just compensation. Complaint ¶ 29.

On December 9, 1992, the BPA upheld the determination of the Zoning Administrator. Complaint ¶ 30. The Board stated it could not rule on the constitutionality of the laws involved in the case. *Id*.

After plaintiffs' request for a rehearing was denied on January 13, 1993, the BPA's decision and order became final. Complaint ¶ 31.

On January 21, 1993, after a public hearing, the Planning Commission approved plaintiffs' application for a conditional use permit upon satisfaction of the following conditions:

> (1) Plaintiffs must mitigate the loss of the 62 residential hotel units by paying 40% of the cost of replacement housing, which equals $567,000;

> (2) Plaintiffs must offer "lifetime leases" to existing long-term tenants; and
>
> (3) Plaintiffs must seek and justify variances from the parking and floor area ratio limitations of the NBNCD. Complaint ¶ 32.

On April 19, 1993, the San Francisco Board of Supervisors rejected plaintiffs' administrative appeal of the conditional use permit and upheld the replacement housing condition imposed by the Planning Commission. Complaint. ¶ 34.

5. Procedural Status

On May 4, 1993, plaintiffs filed the instant action in U.S. District Court. At the same time, plaintiffs filed a petition for a writ of administrative mandate in state court challenging the decision of the City's Board of Permit Appeals requiring the San Remo to obtain a conditional use permit to convert to a permanent tourist hotel.[4] In federal court, the San Remo case was related to another case already pending before U.S. District Judge Vukasin, *Golden Gate Hotel Ass'n v. City and County of San Francisco*, 836 F .Supp. 707 (N.D. Cal. 1993). In the related case of *Golden Gate*, a group of hotel owners brought suit under *section 1983*, Claiming the HCO violated the Takings Clause of the Fifth Amendment.

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[4] Following the Ninth Circuits decision in *San Remo v. City and County of San Francisco*, 145 F.3d.1095, as discussed below, San Remo amended its state court action to assert facial and as-applied takings claims.

In July 1993, plaintiffs moved for a preliminary injunction prohibiting the City from enforcing the HCO against San Remo. While this matter was pending, on September 9, 1993, Judge Vukasin declared the HCO unconstitutional on its face in *Golden Gate*. On September 16 1993, based on the ruling in *Golden Gate*, Judge Vukasin granted plaintiffs' preliminary injunction in the instant case. The Order enjoined the City from requiring compliance with any condition of approval or taking any steps to prohibit plaintiffs from using the San Remo as a commercial tourist hotel. The City filed a notice of appeal and an emergency motion for a stay of the preliminary injunction. The Ninth Circuit denied the motion for stay and the City thereafter abandoned its appeal.

On September 28, 1993, San Remo's case was assigned to this Court.

On January 24, 1994, San Remo filed a first amended complaint. Plaintiffs' amended complaint challenged the constitutionality of the HCO and the validity of the replacement housing condition in the conditional use permit issued to plaintiffs by the City Planning Commission. Counts One and Two of the First Amended Complaint sought declaratory and injunctive relief, respectively, on the grounds that the Planning Commission's imposition of a replacement housing condition in granting the conditional use permit violated plaintiffs' rights to procedural and substantive due process. Counts Three and Four alleged that the HCO affects an unconstitutional takings of plaintiffs' property, both on its face and as-applied. Count Five was a derivative claim that sought damages based on the above-alleged constitutional violations. Count Six was a pendant state law claim under the California Permit Streamlining Act.

Beginning in March 1994, subsequent developments in the courts eroded the basis for the preliminary injunction granted to San Remo. On March 18, 1994, the Ninth Circuit vacated, reversed, and remanded the decision in *Golden Gate* for a determination as to whether appellants' complaint was time-barred under the applicable statute of limitations. *See Golden Gate Hotel Ass'n. v. City and County of San Francisco*, 18 F.3d 1482 (9th Cir. 1994) On remand, *Golden Gate* was assigned to this Court.

On remand, in *Golden Gate*, this Court entered judgment for the City, finding the action time-barred by the applicable statute of limitations and thus dismissing the case. *See Golden Gate Hotel Ass'n v. City & County of San Francisco*, 1994 U.S. Dist. LEXIS 11313 (N.D. Cal. Aug. 2, 1994). On appeal, the Ninth Circuit affirmed this district court's order. *See Golden Gate Hotel Ass'n. v. City and County of San Francisco*, 76 F.3d 386 (Table) (9th Cir 1996), *cert denied*, 519 U.S. 808 (1996).

At the same time as *Golden Gate*, other cases challenging the HCO and related to *Golden Gate* were also assigned to this court. In addition to the related case of *San Remo*, this Court was assigned *Harsch Investment Co v. City & County of San Francisco, Djavahari v. City & County of San Francisco, Tsang v. Superior Court of San Francisco*, and *Sparks v. City and County of San Francisco.*[5]

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[5] This Court denied a related case motion in *Kardosh v. City and County of San Francisco* on March 8, 1994. On July 1, 1994, Senior Judge William Orrick granted defendants' motion to dismiss the complaint.

In *Harsch Investment Corp. v. City and County of San Francisco*, plaintiff alleged virtually the same claims as San Remo, and was represented by the same counsel. On June 21, 1994, this Court denied a temporary restraining order. The Court held, in part, that the HCO is not facially unconstitutional because it clearly serves a legitimate government interest and does not deny all economically viable use of the property. *Harsch Investment Corp. v. City and County of San Francisco*, C-94-0629-DLJ ("TRO Order"), at 4.

In *Djavahari v. City and County of San Francisco*, the Court dismissed a similar challenge to the HCO as moot, when plaintiff sold the subject of the action, his residential hotel. *See Djavahari v. City & County of San Francisco*, 1994 U.S. Dist. LEXIS 2546.

Tsang v. City and County of San Francisco was assigned to this Court on September 28, 1993. The case had been filed in the U.S. District Court after the Supreme Court of California denied petition for review of the Appellate Court's decision in favor of defendant. *Tsang v. Superior Court of San Francisco*, 1991 Cal. LEXIS 527. On March 10, 1995, the Court denied plaintiff's motion for a preliminary injunction enjoining the City's enforcement of the HCO and granted summary judgment to the City. C-91-4360- DLJ. The Court found plaintiff's facial challenge time-barred, as-applied challenge not ripe, and substantive due process claim insufficient on the merits.

In *Sparks v. City and County of San Francisco*, plaintiffs, owners of the Pacific Bay Inn, challenged the constitutionality of the replacement housing fee and attorneys fee requirements of the HCO under the Takings Clause of the Fifth Amendment and as violating their rights to procedural and

substantive due process. C 94-2398-DLJ. This case was filed in federal court after the plaintiffs were involved in two different state court actions regarding the HCO, where they unsuccessfully raised the unconstitutionality of the HCO as an affirmative defense. The City opposed the motion on the grounds that the statute of limitations had run, principles of res judicata, plaintiffs' as-applied challenges were not ripe, and the Ordinance reasonably relates to legitimate public purposes, thus passing constitutional muster. In May 1995, the Court approved a stipulated action by the parties that the case would be dismissed with prejudice.

Along with the cases in this Court, California state courts were also reviewing similar challenges to the HCO.[6] For example, in *Lambert v. City & County of San Francisco*, hotel owners challenged the City's denial of a conditional use permit under the HCO as an unlawful takings. *See Lambert v. City & County of San Francisco*, 57 Cal.App.4th 1172, 1177 (1997). The Superior Court held that the denial of the permit was not a takings, and granted summary judgment to the City. *Id.* The California Court of Appeals affirmed this result. It held that the HCO, as well as the denial of a conditional use permit, passed constitutional muster and did not effectuate a takings. *Id.* at 1180. When reaching its decision, the Court discussed how the applicable standard of review for the City's decision was not the strict scrutiny standard of review stated in *Nollan*[7] and *Dolan*[8], but a more deferential level of review.

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[6] Many of the decisions by the California courts are unpublished.

[7] *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987).

[8] *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

Id. at 1181. The Supreme Court of California denied review. *Lambert v. City & County of San Francisco*, 981 P.2d 41 (Cal. 1999), *cert denied, Lambert v. City & County of San Francisco*, 529 U.S. 1045 (2000).

With the related cases holding the HCO constitutional in the background, the Court continued to review San Remo's case. On August 26, 1996, the Court dissolved the preliminary injunction and granted summary judgment to the City. The Court held: (1) plaintiffs' facial takings claim was barred by the applicable one-year statute of limitations, and there was no basis for applying equitable tolling; (2) plaintiffs' as-applied takings claim was not ripe, and thus the Court lacked subject matter jurisdiction; (3) plaintiff's procedural and substantive due process claims were insufficient on the merits; (4) plaintiff'S pendant state law claims were insufficient on the merits; and (5) plaintiffs' request for leave to amend to add an equal protection claim was denied as futile, because their state law action for mandamus review was still pending.

On appeal, the United States Circuit Court of Appeals for the Ninth Circuit affirmed in part and reversed in part. *San Remo v. City and County of San Francisco*, 145 F.3d 1095 (9th Cir. 1998). The Circuit Court held that San Remo's as-applied takings claim was not ripe because an inverse condemnation action had not been pursued in state court. *Id.* at 1102 (citing *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)). The Court then invoked *Pullman*[9] abstention with

[9] Pullman abstention is an equitable doctrine that allows federal courts to refrain from deciding sensitive federal constitutional questions when state law issues may moot or narrow the constitutional questions. *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095,1104 (9th Cir. 1998). Pullman abstention is-appropriate when: (1) the federal plaintiff's complaint requires resolution of a sensitive question of federal constitutional law; (2) the constitutional question could be mooted or narrowed by a definitive ruling on the state law issues; and (3) the possibly determinative issue of state law is unclear. *Id.* Once Pullman abstention is invoked by a federal court, the federal plaintiff must then seek a definitive ruling in the state courts on the state law questions before returning to federal court. *Id.*

regard to San Remo's facial takings challenge, staying further proceedings pending San Remo's litigation of their state claims. *Id.* at 1105. San Remo then amended their state court petition for writ of administrative mandate to add facial and as-applied takings claims.

In state court, plaintiffs challenged the administrative determination that they needed a conditional use permit by a petition for writ of administrative mandate. They also challenged the $567,000 fee by paying it under protest and asserting a refund claim under the Mitigation Fee Act. *California Government Code §§ 66000 et seq.* Plaintiffs alleged that the City's legislative enactments and administrative actions that resulted in the $567,000 fee was a takings without just compensation. They alleged both a facial and as-applied challenge to the HCO and all of the City's legislative enactments and administrative actions that resulted in the imposition of the $567,000 fee.

Plaintiffs' state court complaint presented their state law claims, but they explicitly reserved their right to litigate their federal claims in federal court by filing an *England*

reservation.[10] *England v Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964).

The San Francisco Superior Court sustained the City's demurrer to the takings claims and denied the petition for a writ of mandate. The California Court of Appeal reversed. The California Supreme Court granted review.

On March 4, 2002, the California Supreme Court issued its decision in favor of the City on all issues *San Remo v. City and County of San Francisco* ("San Remo II"), 27 Cal.4th 643 (2002).

The California Supreme Court held that the plaintiffs' writ petition was properly denied because the San Remo had not been in 100% tourist use (i.e., there had been some residential use) when the zoning changed. *San Remo II*, 27 Cal.4th at 663. The California Supreme Court also affirmed the trial court's decision to sustain the City's demurrer to the plaintiffs' takings claims. The Court held that the HCO was not constitutionally invalid, either on its face or as applied.

On June 4, 2002, San Remo filed their Amended Complaint in this Court. It seeks to litigate their federal takings claims. More specifically, they request: (1) a judicial declaration by this Court that the replacement housing provisions of the HCO and the conditional use authorization

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[10] When a federal court abstains from a case and compels a litigant to submit this entire case to state court, the litigant is not compelled to litigate his federal claims in state court. Through an *England* reservation, a party can preserve his right under the abstention doctrine to return to District Court by informing the state courts that he so intends, should the state courts hold against him on the question of state law. *England*, 375 U.S. at 420.

requirements of the zoning Ordinance, separately and in concert with each other, whether facially or as-applied to plaintiffs, violate their rights to Due Process under the Fifth and Fourteenth Amendments to the United States Constitution and that those provisions be declared invalid and unenforceable; (2) an award of damages in the sum of $567,000 plus interest; (3) an award of costs and attorneys fees as permitted by law; and (4) further relief as the Court deems just and proper.

B. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a district Court must dismiss a complaint if it fails to state a claim upon which relief can be granted. When deciding a Rule 12(b)(6) motion to dismiss, the Court must take all allegations of material fact as true and construe them, and all reasonable inferences therefrom, in the light most favorable to the nonmoving party. *See Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998); *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). The complaint should not be dismissed unless the complainant can prove no set of facts in support of his claim that would entitle him to relief. *Symington*, 51 F.3d at 1484. Even if the face of the pleadings suggests that the chance of recovery is remote, the Court must allow plaintiffs to develop the case at this stage of the proceedings, *United States v City of Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981).

If the Court chooses to dismiss the complaint, it must then decide whether to grant leave to amend. In general, leave to amend is only denied if it is clear that amendment would be futile and "that the deficiencies of the complaint could not be cured by amendment." *Noll v. Carlson*, 809 F.2d 1446, 1448

(9th Cir. 1987)(quoting *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980) (per curium)).

When the complainant has attached various exhibits to the complaint, those exhibits may be considered in determining whether dismissal is proper without converting the motion to one for summary judgment. *Id.* (citing *Cooper v. Bell*, 628 F.2d 1208, 1210 n. 10 (9th Cir. 1980).

II. DISCUSSION

The Court analyzes plaintiffs' takings allegations as four distinct claims; Plaintiffs are alleging both facial and as-applied takings claims to both the HCO and the Planning Code. As conceded by plaintiffs at oral argument, plaintiffs due process claims have been resolved and are not before the Court at this time.

The City argues that the Court should dismiss San Remo's Amended Complaint for failure to state a claim upon which relief can be granted for four reasons. One, the City argues that San Remo's allegations concerning the constitutionality of the conditional use permit are solely questions of state law and should not be heard by this Court. Two, the City argues the actions are time-barred. Three, the City argues even if the takings claims are not time-barred, they must be dismissed under the doctrine of issue preclusion. Finally, the City argues that even if the Court were to consider the takings claims on the merits, they must be dismissed because the Takings Clause is not applicable to an obligation to pay money and, even if it were, the payment of a mitigation fee would not constitute a takings under any applicable test. Each argument will be addressed in turn.

A. The Planning Code and Conditional Use Permit

The conditional use permit approved by the City pursuant to the Planning Code required plaintiffs to pay the City $567,000, as required by the 1990 HCO. In their Amended Complaint, San Remo pleads that this condition constitutes a takings.

The City argues that whether San Remo needs a conditional use permit under the City's Planning Code to convert to a permanent hotel is an issue of state law, and so all references to the Planning Code and the conditional use permit should be ignored. It argues that San Remo's only federal claim in this action is a takings challenge to the HCO.

The City supports its position by arguing that the fee at issue in the case arises from the HCO and not the Planning Code or the conditional use permit. It argues San Remo would have been assessed an HCO fee for conversion regardless of the Planning Commission's action on the conditional use permit. It claims that when granting the conditional use permit, the Planning Commission merely acknowledged the HCO fee. It points to language in the California Supreme Court decision to support its position, where the Court stated: "In their application for a conditional use permit, plaintiffs, who had already applied for a conversion permit under the HCO, assured the Planning Commission that they would comply with the HCO. The Commission incorporated that assurance as a condition of the permit, but did not itself assess any fee." *San Remo II*, 27 Cal.4th at 663.

The Court rejects the City's arguments and finds that both the facial and as-applied federal takings claims with respect to the Planning Code and the conditional use permit must be

considered by the Court. The conditional use permit, issued pursuant to the Planning Code, by its own terms required the payment of $567,000. The fact that the City based this condition on the requirements of the HCO, or that San Remo would have to pay the fee regardless of this condition to the use permit, does not change the fact that San Remo could not get a conditional use permit unless it paid the City $567,000.

B. Statute of Limitations

The City argues that San Remo's facial and as-applied takings challenge based on both the HCO and Planning Code are barred by the applicable statute of limitations.

The United States Supreme Court has generally eschewed any "set formula" for determining whether a takings has occurred. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). Instead, to determine whether a government regulation of property works a taking of property under the Fifth Amendment to the United States Constitution, the Court engages in "essentially ad hoc, factual inquiries," balancing the public and private interests at stake. *Id.; Penn Central Transportation Co. v. NewYork City*, 438 U.S. 104, 124 (1978). In engaging in this essentially ad hoc, factual inquiry, the Supreme Court identified in *Penn Central* several factors that have particular significance, with three primary factors weighing in the balance: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *Penn Central Transportation*, 438 U.S. at 124-27.

Despite this ad hoc inquiry, the Supreme Court has categorically held physical occupation of property is a "taking" requiring just compensation, regardless of the extent

of the physical invasion. *Lucas*, 505 U S. at 1015-1016 (1992); *Yee v. City of Escondido*, 112 S. Ct. 1522, 1528 (1992). Moreover, the Fifth Amendment is violated when a land-use regulation "does not substantially advance legitimate state interests," or denies an owner economically viable use of his land. *Id.* at 1532; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Penn Central*, 438 U.S. at 127, 138.

In order for a court to reach a takings claim on the merits, however, it must be brought within the applicable statute of limitations. Claims alleging an unjust taking must be brought pursuant to *42 U.S.C. § 1983*. The statute of limitations for a claim under *section 1983* in California is one year from the date of accrual. *Wilson v. Garcia*, 471 U.S. 261 (1985); *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 1049 (1993) ("Azul II"); *Golden Gate Hotel Ass'n v. San Francisco*, 18 F.3d 1482 (9th Cir, 1994).[11]

1. Facial Challenge

The city argues that San Remo's facial takings claims are barred by the applicable statute of limitations. This argument was previously made and accepted by this Court in its Order dated August 26, 1996. As explained, infra, and consistently with its previous Order, the Court finds San Remo's facial challenges to both the HCO and the Planning Code are barred by the statute of limitations.

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[11] In *Golden Gate Hotel Ass'n v. City and County of San Francisco*, 18 F.3d 1482 (9th Cir. 1994), the Ninth Circuit vacated Judge Vukasin's decision and ruled that the one year statute of limitations applied to a challenge to the HCO.

a. The HCO

i. 1981 Ordinance

The Fifth Amendment proscribes the taking of property without just compensation. *Levald v. City of Palm Desert*, 998 F.2d 680, 687 (9th Cir. 1993) . Accordingly, as long as the state provides an adequate process for obtaining compensation, no constitutional violation can occur. *Id*. Thus, a plaintiff cannot bring a *section 1983* action in federal court until the state denies just compensation. *Id*.

In cases where it is futile to seek compensation in state court, "a facial challenge to a statute as a takings without just compensation under *section 1983* accrues upon the passage of the ordinance." *Id*. at 688. The unavailability of a state remedy is considered the functional equivalent of a denial of just compensation. *Id*. at 687. California did not recognize a remedy for regulatory takings until 1987. *Id*. at 689.

In this case, the City first enacted the HCO in 1981. Because California did not recognize a remedy for regulatory takings until 1987, any attempts to seek compensation in state court would be futile. *Id*. at 689. Accordingly, the statute of limitations began to run in 1981, when it was first enacted. Plaintiffs did not file their complaint until 1993, twelve years after the enactment of the statute. Thus, their facial claim is time-barred.

San Remo argues that the 1996 Order is erroneous. It argues that the *Levald* case[12], which this Court's decision

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[12] In *Levald*, the owner of mobile home park brought an action challenging Palm Desert's rent control and vacancy control ordinance as effecting a takings without just compensation. The Ninth Circuit held that the petitioner's facial takings claim was time-barred because it was brought over one year after the ordinance was enacted. The Court held that a facial challenge to a statute as a takings without just compensation under *section 1983* accrues upon the passage of the ordinance, if it would be futile to seek compensation in state court. As recognized by the petitioner, it would have been futile to seek compensation in state court because California law had not yet provided a remedy for regulatory takings.

rested upon, has recently been overruled by the Supreme Court in *Franconia Associates v. United States*, 122 S.Ct. 1993 (2002).

San Remo's analysis of *Franconia* is misplaced. In *Franconia*, the federal government entered into mortgage loan contracts with developers of affordable housing. The loan contracts required that housing projects using loan money remain affordable for the life of the loan. The loan contracts, however, allowed the developers to prepay the loans and, thus, remove the affordability restrictions. In 1988, the government enacted a new statute entitled the Emergency Low Income Housing Preservation Act of 1987 ("ELIHPA"). ELIHPA restricted the government's ability to "accept" prepayments as promised in the loan agreements.

The petitioners argued that the statute of limitations for challenging ELIHPA began to run when the statute was passed. Relying on contract law, the Supreme Court rejected this argument. Reversing the Federal Circuit, it found that a cause of action for breach of contract based on the prepayment clause of ELIHPA did not accrue until a borrower performed, that is, attempted and was prevented from making a prepayment as promised. *Id*. at 2002. Having reversed the Federal Circuit Court's decision on the basis of

contract law, the Court found that it "need not separately address petitioners' alternate theory of recovery based on the Takings Clause of the Fifth Amendment," and remandedthe case back to the lower court. *Id.* at 2004. Thus, the decision in *Franconia* left the holding in *Levald* unaffected.

ii. 1990 Ordinance

San Remo also argues that the statute of limitations does not bar their action because it is the 1990 HCO and not the 1981 Ordinance which fails to pass constitutional muster. As such, plaintiffs argue that the statute of limitations began to accrue either when the City imposed the $567,000 fee as a condition of the conditional use permit in 1993 or when the state courts rejected their claim on appeal.

Plaintiffs support this theory by arguing that "while the original Hotel Ordinance might have passed constitutional muster because it allowed unlimited use of residentially designated rooms during the summer months," the 1990 HCO goes "too far." *Opposition* p. 18. It argues that the new provisions in the 1990 HCO which increases the replacement housing fee, limits summer tourist use to 25% and requires "winter residential rentals to permit the summer tourist rentals" constitute such significant changes that it resulted in a facial takings. *Id.*

The Ninth Circuit recognizes that a subsequent modification of a statute may give rise to a new cause of action, thus restarting the clock for calculating the statute of limitations. *DeAnza Properties, Ltd. v. County of Santa Cruz*, 936 F.2d 1084, 1086 (9th Cir. 1991). However, a re-enactment of a statute does not restart the clock in the takings context when the plaintiffs suffer virtually the same injury under a new amendment as under the prior law. *Id.*

In this case, the core arguments as to why the 1990 amendments are unconstitutional are equally applicable to the 1981 Ordinance. San Remo's arguments are that: (1) the $567,000 permit fee is a "ransom" that fails to substantially advance legitimate government interest because it: (a) requires the payment of the $567,000 permit fee; (b) forces plaintiffs to bear the public burden of housing the poor; (c) forces San Remo and a small group of other residential hotels to provide a general public benefit and (d) constitutes "extortion"; and (2) the HCO fails to substantially advance a legitimate state interest, and forces plaintiffs to bear the public burden of housing the poor, without just compensation.

As to San Remo's first and primary challenge based upon the $567,000 fee, they suffer the exact same injury under the 1990 Ordinance as under the 1981 Ordinance. The amount of the replacement housing fee that San Remo is required to pay is based on the 1981, and not the increased 1990 rates. San Remo was grand-fathered in under the 40% replacement housing fee requirements of the 1981 HCO. *San Remo II*, 27 Cal. 4th at 651 n.3.

San Remo's arguments based on the changes in summer tourist use are also unavailing. San Remo's injury under the 1990 Ordinance is not significantly different than under the 1981 version. While the 1990 Ordinance limited summer use, it did not do so in the unconditional manner alluded to by San Remo. Instead, as already described, it limits summer use to 25% unless an individual fails to satisfy certain criteria. *HCO* § 419(a); *San Remo II*, 27 Cal.4th at 651-52. Thus, on its face, the 1990 HCO did not substantially increase the injury

suffered by San Remo.[13]

Moreover, even if San Remo's facial challenge to the HCO did not accrue until 1990, their action, which was filed in 1993, is still untimely. For "substantially advances" takings claims, the denial of just compensation is irrelevant for purposes of ripeness. *San Remo v. City and County of San Francisco* (San Remo I), 145 F.3d 1095, 1102 (9th Cir. 1998). Therefore, San Remo's claim that the HCO does not substantially advance legitimate government interests was ripe and the one-year statute of limitations began to run in May 1990 when the statute was enacted three years before this action was filed.

b. Planning Code

The City adopted the NBNCD in 1987, six years before this action was filed. A facial challenge accrued at this time, and, for the reasons, discussed above, San Remo's facial challenge to the Planning Code is time-barred.

c. Equitable Tolling

San Remo argues that their facial challenges are not barred by the statute of limitations because the period was equitably tolled. This argument was made to this Court and rejected in its August 1996 order. As the Court ordered in 1996, equitable tolling rules do not apply. *See Order*, dated

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[13] Moreover, the City points out in its Opposition that San Remo applied for and received approval from the City for 100% summer tourist rentals under *HCO* § 419(a) for each year following the 1990 amendments until the San Remo was converted to a permanent tourist hotel in 1993.

August 26, 1996. As in 1996, San Remo is unable to allege any facts that the City was on notice of their constitutional claims, thus tolling the statute of limitations, before the limitations period had run.

Federal courts borrow equitable tolling rules from the forum state. *Cervantes v. San Diego*, 5 F.3d 1273 (9th Cir. 1993). Under California law, a plaintiff's pursuit of a remedy in another forum equitably tolls the limitations period if a plaintiff's action satisfy the following three-pronged test: (1) timely notice to the defendants in filing the first claim; (2) lack of prejudice to the defendants in gathering evidence to defend against the second claim; and (3) good faith and reasonable conduct in filing the second claim. *Cervantes*, 5 F.3d at 1275 (citing *Donoghue v. Orange Co.*, 848 F.2d 926, 931 (9th Cir. 1987)). The doctrine of equitable tolling "focuses on the effect of the prior claim in warning the defendants in the subsequent claim of the need to prepare a defense." *Id.* In California, application of the three-part test is "mandatory" in determining whether equitable tolling applies. *Id.* at 1275-76.

In this case, defendant claims that plaintiffs fail to satisfy the first prong of the California test. According to the City, plaintiffs' administrative filings were insufficient to provide it with the notice required by the equitable tolling doctrine because none of plaintiffs' administrative filings constituted challenges to the constitutionality of the HCO or the Planning Code.

The Court rejects the City's argument that it was not provided with proper notice during the administrative proceedings. California does not require that the actions brought by a plaintiff be identical in order to satisfy the notice requirement. *Retail Clerks Union Loc. 648 v. Hub Pharmacy*,

707 F.2d 1030, 1034 (1983), citing *Elkins v. Derby*, 12 Cal.3d 410 (1974) . " [A] defendant's interest in notice is to enable it to gather and preserve evidence. . . . When the notification purpose of a statute of limitations is satisfied, the court liberally applies tolling." *Id*. In August 1996, plaintiffs submitted briefs in the administrative proceedings which provided adequate notice of plaintiffs' constitutional challenge to the HCO.

However, although the briefs submitted by plaintiffs would appear sufficient to satisfy the notice requirement as of that time, plaintiffs' did not present evidence in1996, nor allege any facts which would support a showing that the City had notice of the arguments contained in these briefs prior to the running of the one year statute. As plaintiffs admitted, the first hearing on these issues was scheduled for August 20, 1992, over two years after the enactment of the 1990 HCO, and thus after the statute of limitations had expired. Without timely notice, equity does not permit the tolling of the limitations period during the pendency of plaintiffs' administrative appeals. Accordingly, the equitable tolling rules do not apply to plaintiffs' facial takings claims.

2. <u>As-applied Challenge</u>

In this Court's 1996 Order, it did not find that San Remo's as-applied takings claims were time-barred, but rather that the claims were unripe for adjudication in federal court. *Order* at 18. San Remo now argues that the HCO and conditional use authorization requirements of the Zoning Ordinance as-applied to them violate the Fifth Amendment.

The proper categorization of San Remo's claim as facial or as-applied is important, amongst other things, as each raises different ripeness and statute of limitations issues. *San Remo II*, 1998 F2d at 686.

A facial challenge to the constitutional validity of a statute considers the text of the legislation itself. In contrast, an as-applied challenge "contemplates analysis of the facts of a particular case or cases to determine the circumstances in which the statute or ordinance has been applied and to consider whether in those particular circumstances the application deprived the individual to whom it was applied of a protected right." *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1084 (1995).

In the context of a constitutional takings claim, a facial challenge involves "a claim that the mere enactment of a statute constitutes a takings," while an as-applied challenge involves "a claim that the particular impact of a government action on a specific piece of property requires the payment of just compensation." *Keystone Bituminous Coal Ass'n*, 480 U.S. at 494, (1987).

In order to assert an as-applied challenge, plaintiffs must allege that a particular ordinance is applied differently to their particular property than to other similarly situated property owners. For example, in *Travis v. County of Santa Cruz*, the petitioner argued that the County exceeded its authority by imposing certain occupancy restrictions, rent controls and deed restrictions as mandatory conditions upon granting development of specified property. 122 Cal. Rptr. 2d 713 (2002). The Court held that the petitioners failed to assert an as-applied takings challenge, despite their arguments to the contrary. *Id*. at 721. It reasoned that because the petitioners did not "clearly allege" that any of the imposed conditions

differed in anyway from conditions imposed on other applicants for permits, or that the Ordinance had a disparate fiscal effect on them as compared to other similarly situated proper owners, their claim was only facial. *Id.*; *Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal.4th 952, 961, (1999).

Similarly, in *Levald*, the Ninth Circuit found that the plaintiffs failed to "clearly" allege an as-applied takings challenge. *Levald*, 998 F2d at 686. The Court reasoned that the payment required in the statute at issue, though the amount might vary amongst property owners, arose not based on a particular application of the statute, but solely from the existence of the statute itself. *Id.*

a. The HCO

The City argues that San Remo's "as-applied" claims regarding the HCO should be categorized as a facial, rather than as-applied, because San Remo is not challenging the amount of the fee imposed on their property, but rather the underlying policy of the HCO. *See Complaint* ¶¶ 51, 63, 64, 66, and 67.

The Court finds that San Remo's "as-applied" claims regarding the HCO should be categorized as a facial, and not an as-applied takings claim. San Remo is not challenging the amount of the fee imposed on their property, but rather the underlying policy of the HCO. *See Complaint* ¶¶ 51, 63, 64, 66, and 67.[14] It contends that the HCO in its entirety fails to

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[14] As the City argues, San Remo never filed an administrative appeal challenging the City's appraisal of 40% of the replacement costs of the converted units or has it pled or argued in any of the prior court proceeding that the fee exceeded the 40% replacement

substantially advance legitimate state interests. It does not allege an impermissible application of the Ordinance or that the City is imposing the statute in a manner different from similarly situated property owners.[15]

Moreover, as in *Levald*, it is the existence of the HCO and not a particular application that gives rise to the alleged takings. The HCO imposes the replacement housing requirement based on a formula. As the California Supreme Court found "The HCO is a generally applicable legislation that applies, without discretion or discrimination, to every residential hotel in the City. All proposals to convert residential tourist use are subject to the same ordinance." *San Remo II*, 27 Cal.4th at 669.

Thus, San Remo's claim should be categorized as facial, rather than an as-applied challenge. As such, it is barred under the statute of limitations as discussed above.

Even if San Remo were to plead an as-applied challenge, it would still be time-barred because it accrued in 1981 when the City enacted the HCO. The Supreme Court has stated that an "as-applied" takings challenge is ripe, thus starting the clock for the statute of limitations, when the entity charged with implementing the ordinance at issue arrived at a final

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cost.

[15] The most "specific" argument made by San Remo appears in their Opposition. They argue that even though more than 500 properties are subject to the HCO, fewer than 20 have ever paid a fee, and so they are being treated differently than other properties. The Amended Complaint, however, pleads only that they and a few other property owners are required to provide a general public benefit and does not plead differential treatment.

definitive position regarding how it will apply the regulations at issue to the particular land in question. *Greenbrier v. United States*, 193 F.3d 1348, 1359 (Fed. Cir. 199), *cert. denied*, 530 U.S. 1274 (2000); *Williamson*, 473 U.S. at 186.

As discussed by the California Supreme Court in *San Remo II*, 27 Cal.4th at 668-70, the HCO is a generally applicable statute.[16] It applies to every residential hotel in the City without discretion or discrimination. As such, the statute of limitations began to run in 1981 when the City applied the HCO to the San Remo. In 1981, following San Remo's response to the City's survey indicating that all the guests rooms in the hotel had been rented to long term residents on September 23, 1979, the City issued a Certificate of Use to San Remo confirming that all of its guest rooms were subject to the HCO. *San Remo II*, 27 Cal.4th at 653-54. This certificate was displayed in the hotel lobby; under the HCO, the City-issued certificate of use was required to be posted in the hotel lobby when issued in 1981. HCO § 41.6(d). As already described, plaintiffs assert they were unaware of the 1981 survey that established the hotel's initial status, and did not know the hotel's classification until 1983. Even if this Court used 1983, the year San Remo took possession of the hotel and became aware of the classification, as the applicable time for when their claim accrued, their action is still time-barred, as it was not filed until 1993.

There was no discretionary application by the City to San

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[16] According to the City, the ordinance applies to more than 500 properties containing (as stated in the 1990 HCO) more than 18,000 guest rooms. *HCO* § 41.3, subd. (d) . In *San Remo II*, plaintiffs accepted these numbers, but nonetheless, characterized the City as imposing housing preservation costs on on "a few" property owners. *San Remo II*, 27 Cal. 4th at fn. 12.

Remo after 1981, which would restart the limitations period. Thus, San Remo's as-applied challenge is time-barred.

b. The Planning Code

San Remo also asserts an as applied challenge to the Planning Code. In light of the discussion above as to as-applied claims, the Court finds that San Remo has not properly pled an as-applied challenge to the Planning Code.

However, it appears to the Court on the record thus far, that if an as-applied claim was properly asserted, the statute of limitations would not bar such a challenge. Arguably the last discretionary act of the City was in 1993 when the Board of Supervisors rejected San Remo's challenge to the conditions of the conditional use permit San Remo's first action in this Court was in 1993.

c. Equitable Tolling

For the same reasons stated above and in its 1996 Order, the Court finds that the equitable tolling rules are also inapplicable to San Remo's as-applied challenge to the HCO and Planning Code.

C. Issue Preclusion

The City argues that even if the takings claims are not time-barred, they must be dismissed under the doctrine of issue preclusion, which is known as collateral estoppel in California courts. The City concedes that San Remo's claims are not barred under the separate doctrine of claim preclusion because San Remo reserved their federal takings claims with an "*England* Reservation."

The preclusive effects of a former adjudication are collectively referred to by most commentators as the doctrine of "res judicata." *See* Restatement (Second) of Judgments, Introductory Note before ch. 3 (1982); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4402 (1981). Res judicata is often analyzed further to consist of two preclusion concepts "issue preclusion" and "claim preclusion." *Migra v. Warren City School Dist. Bd. of Educ*, 465 U.S. 75, 77 n. 1 (1984). "Claim preclusion" refers to the preclusive effect of a judgment in foreclosing relitigation of claims that were raised or should have been raised in earlier litigation. *Id.* "Issue preclusion" refers to the preclusive effect of a judgment in foreclosing relitigation of issues that have been actually and necessarily decided in earlier litigation. *Id.*

Under the doctrine of claims preclusion, "[A] valid final adjudication of a claim precludes a second action on that claim or any part of it." *Baker ex rel. Thomas v. General Motors Corp.*, 522 U.S. 222, 233 n. 5 (1998).

Under the doctrine of issue preclusion, a valid and final determination, in one proceeding of a necessary factual or legal issue may not be re-litigated in a subsequent proceeding involving a party to the prior action. *See Dodd v. Hood River County* ("Dodd II"), 136 F3d 1219, 1224 (9th Cir. 1998).

Pursuant to the Full Faith and Credit Act, *28 U.S.C. § 1738*, federal courts must "give a state court judgment the same preclusive effect as would be given to that judgment under the law of the state in which the judgment was rendered." *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). Therefore, California law on issue preclusion dictates our analysis. *Dodd II*,136 F.3d at 1225.

1. California Law

California Courts apply the doctrine of collateral estoppel to attempts to re-litigate the same issue in a later action. *Griset v. Fair Political Practices Com.*, 25 Cal.4th 688, 701-02 (2001). Collateral estoppel bars re-litigation of an issue decided at a previous proceeding if: (1) the issue decided in the prior case is identical with the one now presented; (2) there was a final judgment on the merits in the prior case; and, (3) the party to be estopped was a party to the prior adjudication. *Stolz v. Bank of America*, 15 Cal.App.4th 127; 222 (1993). Accordingly, if the substantive laws of takings in California and federal courts are coextensive, issue preclusion applies to any takings issues that were decided in California state courts that are later brought in federal court. *Dodd v. Hood River County* ("Dodd I"), 59 F.3d 852, 861 (9th Cir. 1995).

Under the takings clause of the California Constitution (art. I, § 19), "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into Court for, the owner." The federal takings clause (U.S. Const., 5th Amend.) provides: "nor shall private property be taken for public use without just compensation." Aside from protecting "a somewhat broader range of property values" than the corresponding federal provision, California construes both the federal and state clauses congruently. *San Remo II*, 27 Cal.4th at 664; *Hensler v. City of Glendale*, 8 Cal.4th 1, 9, fn. 4 (1994). Thus, because the substantive laws of takings in California and federal courts are coextensive, collateral estoppel applies through the doctrine of issue preclusion when the three-part California test is met.

In this case, San Remo alleges a takings based on two theories: (1) the replacement housing provisions of the HCO and the conditional use authorization requirements of the Zoning Ordinance Planning Code fail to substantially advance legitimate state interests, Complaint ¶¶ 51, 63-66; and (2) the replacement housing provisions of the HCO and the conditional use authorization requirements of the Zoning Ordinance Planning Code fails the *Penn Central* multi-factor test. These issues, with respect to the HCO, are precisely the same issues decided by the California Supreme Court based on federal law, thus satisfying the first prong of the three-part California test for issue preclusion. In state court, plaintiffs challenged the housing replacement requirement, alleging a takings of private property without just compensation.[17] The Court held that the HCO was not unconstitutional, either on its face or as-applied. *San Remo II*, 27 Cal.4th at 664-65, 676-79.

When reaching the final judgment on the merits, the California Supreme Court based its decision on both state and federal law. As stated by the California Supreme Court, "despite plaintiffs' having sought relief in this Court only for a violation of article I, section 19 of the California Constitution," the Court analyzed "their takings claim under the relevant decisions of both this Court and the United States

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[17] In state court, plaintiffs also challenged the conditional use permit requirement by way of a petition for a writ of administrative mandate. The California Supreme Court held that the trial court properly denied plaintiffs' petition for a writ of administrative mandate challenging the conditional use permit. *San Remo II*, 27 Cal.4th at658.

Supreme Court."[18] Consistent with this statement, throughout the decision, the California Court made repeated references and analyzed plaintiffs' claims based on Supreme Court takings case law. *See, e.g., San Remo II*, 27 Cal.4th at 664-71 (analyzing San Remo's claim under the *Penn Central* multi-factor test, and assessing whether the heightened *Nollan/Dolan* level of review applies). It then concluded, based on both federal and state takings law, that the HCO is not unconstitutional on its face or as-applied under either the California or United States Constitution. *Id.* at 676-77. More specifically, the Court recognized how "federal and state takings clauses, to be sure, place a limit, imprecise as it may be, on the regulatory burdens an individual property owner may be made to bear for public purposes." *San Remo II* , 27 Cal. 4th at 672-680, *citing Agins v. Tiburon*, 447 U.S. 255 (1980); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. at p. 491 & fn. 21; *Penn Central*, 438 U.S. at 124. However, after an analysis of federal law, the Court found that the housing replacement fee of the HCO bears a reasonable relationship to the loss of housing in San Francisco. *Id.*

The Court also rejected San Remo's as-applied challenge to the HCO. The Court reasoned that plaintiffs did not allege that the San Remo Hotel was, in 1979 or at any time, entirely in tourist use, as would be required to support their claim that the housing replacement fee has "no connection at all" to the hotel's historical use. As such, the Court rejected plaintiffs' argument that the amount of the fee paid by plaintiffs bore no

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[18] The California Supreme Court analyzed San Remo's claims under applicable federal law despite footnote 1 in its decision, where it includes language that suggests otherwise.

reasonable relationship to the impacts of their proposed conversion to tourist use. *Id.* at 678.

This final judgment decided issues identical to those raised by San Remo in its facial takings challenge to the HCO. Moreover, the Court decided San Remo's as-applied takings challenges to th HCO. Thus, if San Remo had properly alleged an as-applied takings claim to the HCO, it too would likely satisfy the first prong of the California test.

As to the second prong, the California Supreme Court decision was a final judgment on the merits. As discussed below, California courts consider a decision on a demurrer, as one on the merits, and consistently apply the doctrine of collateral estoppel. *See e.g., Briggs v. Lawrence*, 230 C.A.3d 605, 611 (1991); *Barker v. Hill*, 191 C.A. 3d 221 (1987).

Finally, as to the third prong of the California test for issue preclusion, San Remo was a party to the prior action.

Thus, the California Supreme court final judgment on the merits decided the identical issue now pled in the Amended Complaint with respect to the HCO. Accordingly, collateral estoppel applies to plaintiffs' facial challenge to the HCO; based on collateral estoppel, the Court would not have jurisdiction to address the challenge had it not been barred by the statute of limitations. Moreover, the California Supreme Court decided that the HCO was not unconstitutional as-applied to plaintiffs. As such, if plaintiffs properly alleged an as-applied claim, and it had not been barred by the statute of limitations, the decision would likely create collateral estoppel through the doctrine of issue preclusion also.

2. Level of Review

San Remo and the PLF argue that this court should not apply the doctrine of issue preclusion because the California Supreme Court applied an extremely deferential "rational basis" level of review instead of the "required" heightened *Nollan* and *Dolan* standard. *See Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

Even if this Court were free to disregard the findings of the California Supreme Court, the Court finds that the heightened *Nollan* and *Dolan* standards do not apply to this case. This ruling is consistent with the 1996 Order of this Court, where it also ruled that a heightened level of review does not apply.

In *Nollan*, the Supreme Court was presented with a case where the California Coastal Commission required, as a condition to approval of a rebuilding permit, that owners provide the public an easement to pass across a portion of their property. After recognizing how a land use regulation does not effect a takings if it substantially advances legitimate state interests and does not deny an owner economically viable use of his land, the Court found that the Commissioner's condition did not meet "even the most untailored" standard of means-end scrutiny, and thus required the payment of just compensation. *Nollan*, 483 U.S. at 834, 838, *citing Agins v. City of Tiburon*, 447 U.S. 255 (1980). While the Court did not elucidate with any precision the required means-end fit, it did caution that judicial scrutiny would be searching when "the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the

stated police-power objective." *Id.* at 841. Despite the fact that the standard articulated in *Nollan* was not explicitly conditioned on the taking of a possessory land interest, after *Nollan*, the Ninth Circuit decided in *Commercial Builders* that the correct standard for analyzing a regulation which does not exact a possessory land interest is the more permissive rational relationship test found in its earlier decision, *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983). *Commercial Builders*, 941 F.2d 872, 874 (9th Cir. 1991).

In *Commercial Builders*, appellants challenged an Ordinance by the City of Sacramento to help expand available low income housing. The Ordinance conditioned certain types of nonresidential building permits upon the payment of a fee intended to offset the burdens on the city caused by low-income workers who moved there to fill jobs created by the project in question. The Ninth Circuit held that the Ordinance in question did not work an unconstitutional takings because it was reasonably related to its stated purpose. *Id.* at 874-875. The Court rejected appellants argument that *Nollan* imposes a more stringent level of review for ordinances that place conditions on development; it further rejected the argument that the Ordinance must substantially advance its stated purpose. *Id.* In reaching its decision, the Ninth Circuit noted how none of the Circuits that considered the constitutionality of ordinances placing burdens on land use after *Nollan* interpreted the case as changing the level of scrutiny to be applied to regulations that do not constitute a physical encroachment on land. *Id.* citing *St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 357 n. 6 (2d Cir.1990), *cert denied sub nom. Committee to Oppose Sale of St. Bartholomew's Church v. Rector*, 499 U S. 905 (1991); *Adolph v. Federal Emergency Management Agency*, 854 F.2d 732, 737 (5th Cir. 1988); *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172, 178 (4th Cir. 1988). The

Court also rejected appellant's argument that the fee represented a transfer of property, and therefore more closely resembled a physical taking of property. The Court reasoned "Under appellants' theory, however, compensation would be required for every fee; therefore, every fee would be unconstitutional. We see no valid basis for such a rule." *Id.* at 875. The Supreme Court's more recent decision, *Dolan v. City of Tigard*, 114 S.Ct. 2309, 2316 (1994), does not undercut the explicit distinction drawn by the Ninth Circuit in *Commercial Builders*. Thus, Ninth Circuit precedent imposes a deferential level of review for ordinances that do not involve a physical taking.

In *Dolan*, the Supreme Court was presented with a situation similar to that in *Nollan*, where a government agency conditioned a development permit on dedication of a portion of the applicant's land. As such, the court elaborated on the question it had reserved in *Nollan*, namely the "required degree of connection between the exactions and the projected impact of the proposed development." *Dolan*, 512 U.S. at 386. It discussed that while no "precise mathematical calculation is required," a standard of "rough proportionality best encapsulates what we hold to be the requirement of the Fifth Amendment" *Id.* at 391. However, when elaborating and applying this "heightened scrutiny," the Court distinguished both the *Dolan* and *Nollan* cases from "other land use cases that involve essentially legislative determinations classifying entire areas of the city" or when "conditions imposed are simply a limitation on the use petitioner might make of her own parcel," where a more deferential standard is utilized. *Id.* at 385. It noted how, when evaluating generally applicable zoning regulations, "the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property

rights." *Id.* at 391 in. 8, *citing Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

In this case, as discussed by the California Supreme Court, the HCO does not provide City staff or administrative bodies with discretion as to the imposition or size of the housing replacement fee, and it applies the Ordinance without discretion or discrimination to every residential hotel in the city. *San Remo II*, 27 Cal.4th at 668. The City did not require dedication of any of San Remo's property as in *Nollan* or *Dolan*, nor did it require compliance with the statute in an arbitrary manner. As such, the heightened *Nollan* and *Dolan* standard do not apply in this case. The California Supreme Court utilized an appropriate level of scrutiny.

3. California Application of Issue Preclusion

San Remo argues, that California courts would not apply collateral estoppel in this case for four reasons.

First, San Remo argues that collateral estoppel should not apply because California courts only apply the doctrine to factual and not legal issues. It thus contends that because the California Supreme Court sustained a demurrer, where it could not make factual findings, its ruling does not preclude a later action based on the same factual allegations.

The Court rejects San Remo's argument. California courts have consistently applied collateral estoppel to questions of law. *See, e.g., Rutherford v. State of California*, 233 Cal. Rptr. 781 (1987); *United States Fire Insurance Company v. Hans F. Johansen*, 270 Cal.App.2d 824 (1969); *Pacific Maritime Assn. v. California Unemp. Ins. Appeals Board*, 236 Cal.App.2d 325, 334 (1965). When a question of law essential to a judgment is actually litigated and determined by

a valid and final judgement, it is conclusive on a later action that arises out of the same subject matter or transaction, unless injustice would result. *Johansen*, 270 Cal.App.2d at 834-35.

In this case, San Remo does not argue, nor would there be, any injustice from applying issue preclusion. The issues of law decided by the state Supreme Court arise out of the exact same transaction at issue in this case. Thus, the doctrine of issue preclusion applies to this case.

Second, San Remo argues that California courts give only limited effect in subsequent proceedings to a ruling on a demurrer.

The Court rejects this argument. In California, collateral estoppel applies when an issue is actually litigated and determined on a motion to dismiss for failure to state a claim, a motion for a directed verdict, or their equivalents. *Barker v. Hill*, 191 C.A.3d 221 (1987). Courts do not make a distinction when applying the doctrine based on the form of the ruling. In fact, it is not even necessary that an "exhaustive adversarial hearing" is conducted in order to preclude re-litigation. *Briggs v. Lawrence*, 230 C.A.3d 605, 611 (1991).

Third, San Remo argues that their federal takings claim is not barred because they are asserting "a different-albeit closely related-cause of action."

The Court also rejects this argument. California courts will not apply collateral estoppel if the second action concerns new facts or circumstances. *Oro Fino Old Mining Corp. v. El Dorado*, 225 C.A 3d 872, 878. However, the Courts consistently apply it for issues raised, even when some factual matters or legal arguments which could have been presented

were not. *Id*. This is true even if the unraised arguments or facts would have produced an opposite result if they had been raised. *Mattz v. Superior Court*, 250 Cal.Rptr. 278 (1988).

In this case, San Remo is arguing a violation of the Takings Clause based on the exact same facts and circumstances argued before the state courts. San Remo has not alleged any new changes since the California Supreme Court decision on March 4, 2002 At most, San Remo is arguing additional facts and arguments that it failed to argue before the state court. Yet, even if this is the case, collateral estoppel still applies.

Finally, San Remo contends that the "interpretation of a written document- without considering any extrinsic evidence" in a first action is not given preclusive effect in a second action, citing *Johansen*, 270 Cal.App.2d 824 (1969). However, the *Johansen* case does not stand for such a proposition. In *Johansen*, the Court invoked the exception to collateral estoppel because, based on the individual circumstances of the case, application of the doctrine would result in "grave injustice." *Id.* at 834. Neither it, nor other California court decisions, invoke the rule urged by San Remo.

4. England Reservation

San Remo and PLF argue that collateral estoppel does not apply because: (1) the Ninth Circuit ordered this Court to abstain under *Pullman*; and (2) San Remo invoked *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964) in reserving their federal claims for federal court.

The Ninth Circuit held in *Dodd II* that a previous *England* reservation of a federal takings claims does not prevent

operation of the issue preclusion doctrine. 136 F.3d 1219 (1998). In *Dodd II*, Dodd filed a suit under *section 1983* in federal court alleging a takings in violation of the Fifth and Fourteenth Amendments. The District Court dismissed the claim as unripe. The Dodds appealed. However, because the Oregon Supreme Court decided the case during the pendency of the appeal, the Ninth Circuit determined that the federal issue was ripe and remanded. When arguing before the Oregon state courts, the Dodds explicitly asked the Oregon courts to refrain from addressing the takings issue under federal law by making an *England* reservation. On remand, the District Court determined that, despite the Dodd's *England* reservation, their federal claims were barred under the doctrine of issue preclusion.

The Ninth Circuit upheld this result. The Ninth Circuit stated "Nor does the Dodd's previous reservation of this federal takings claim under the doctrine of *England* prevent operation of the issue preclusion doctrine." *Id*. at 1227. The Court found that, "to the extent a party fully litigates a necessary issue in the course of a state proceeding that is identical to an issue before the federal court, they are precluded from taking a second bite of the apple." *Id*. The Court did note, however, that a party can effectively reserve claims for federal court under the *England* doctrine. *Id*. at 1227.

In *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992), homeowners brought a civil rights action against the Tampa airport based on claim that flights over their property constituted a takings. The homeowners filed suit in Manatee County Circuit Curt raising only state claims. After losing in state court, the homeowners filed suit in federal court under federal law. The district court dismissed the suit on res judicata principles. The Eleventh

Circuit upheld this result. In doing so, the Eleventh Circuit recognized the jurisdictional problem created by the interplay of *28 U.S.C. 1738*[19] and the Supreme Court's holding in *Williamson County*[20]. On the one hand, *Williamson County* requires potential federal court plaintiffs to pursue any available state court remedy that might lead to just compensation. On the other hand, if a litigant brings a takings claim under the relevant state procedure, he runs the risk of being barred from returning to federal court. *Id.* at 1301. The Court also recognized that the Supreme Court has not made a definitive ruling on the interplay of this case law. *Id.*; *Allen v. McCurry*, 449 U.S. 90, 101, 103-04 (1980).

The Eleventh Circuit resolved the dilemma by finding that a litigant involuntarily in state court, such as under *Williamson County*, can avoid issue preclusion through a *Jennings* reservation.[21] *Jennings v Caddo Parish School Bd.*, 531 F.2d 1331 (5th Cir. 1976). However, when coming to

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[19] Pursuant to *28 U.S.C. 1738*, "... Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

[20] In *Williamson County*, the Supreme Court held that a takings claim is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue. *Williamson County*, 473 U S. at 186.

[21] A *Jennings* reservation allows a plaintiff in state court to reserve the right to bring federal claims in federal court should the state court find adversely to plaintiffs. A *Jennings* reservation is not at issue in this case.

this conclusion, the Court noted how it questioned the continued validity of *Jennings*, but was reluctant to overrule the case because it was "too late in the day" to do so. *Id.* It also stated how "If a *Jennings*-type reservation is not available in *section 1983* actions raising takings claims, 'plaintiffs could never obtain a hearing on their federal constitutional claims in federal court.'" *Id.* at 1307, quoting *Henry v. First Nat'l Bank of Clarksdale*, 595 F.2d 291, 298 n. 1 (5th Cir. 1979).

San Remo argues that the *Dodd I* and *Fields* cases are inapplicable, though both involved and discussed an *England* reservation, because neither involved *Pullman* abstention. The Court rejects this argument and find that both apply and support application of issue preclusion in this case. Neither decision is dependent on the fact that there was no *Pullman* abstention. Instead, both stress how litigants in state court, even if they are there involuntarily and invoke an *England* reservation, could be barred from later litigation in federal court by the doctrine of issue preclusion.

In addition to the reasoning of the *Dodd II* case, the City argues that issue preclusion should apply because San Remo voluntarily litigated their claims in state courts.[22] It argues that

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[22] San Remo argues that a plaintiff should not be required "without his consent and through no fault of his own, to accept instead a state's court's determination of [its federal] claims." However, in the Ninth Circuit case, it was plaintiffs who urged the Court to apply *Pullman* abstention. As stated in the Ninth Circuit decision: "Ironically, it is Field who urge us to abstain under *Pullman*. Normally, of course, *Pullman* abstention is invoked by the defendant, not only because it is the plaintiffs who initially chose the federal forum (and thus presumably wants it), but because *Pullman* abstention tends to delay resolution of the plaintiff's

the whole rationale for an *England* reservation and San Remo's argument as to why issue preclusion should not apply is inapplicable in ths case based on San Remo's voluntary decision to litigate in state court. As such, it argues that the failure of this Court to apply the doctrine would lead to the type of forum shopping that issue preclusion is designed to prevent.

The Court agrees with the City that San Remo voluntarily litigated its claims in state court. As discussed in the case before the Ninth Circuit, it was plaintiffs who urged the court to abstain under *Pullman*. *See San Remo I*, 145 F.3d at 1104-05. For this reason, as well as the reasoning discussed above, plaintiffs should be precluded from re-litigating their claims in federal court.

D. San Remo's Claim on the Merits

The City argues that even if the court were to consider the takings claim on the merits, it must be dismissed because the Takings Clause is not applicable to an obligation to pay money and, even if it were, the payment of a mitigation fee would not constitute a takings under any applicable test. Because this motion is under 12(b)(6), the Court will not rule on the merits at this point.

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constitutional claims. Unsurprisingly, the City views Field's request for abstention as an outrageous act of chutzpah, and argues that Field should be stuck with the federal forum he chose. Although we have some sympathy for the City's position, we agree with Field that a plaintiffs may raise *Pullman* abstention just as a defendant may, and he may do so for the first time on appeal." *San Remo I*, 145 F.3d at 1104-05.

However, if this Court were to rule on the merits, the Court agrees with the underlying rulings in previous cases.

As discussed in the Court's 1996 Order, even under the more demanding "substantial advancement" standard, the HCO and Planning Code would survive constitutional scrutiny against a facial challenge. The City's interest in preserving affordable rental housing is a legitimate government interest. On its face, both the HCO and Planning Code substantially advances this interest; the HCO does so by requiring landowners renting residential units to pay a portion of the costs of replacement housing before converting their units to alternative uses, while the Planning Code does so by requiring owners seeking to convert a residential use to a tourist hotel to first secure a conditional use permit. *See* HCO §§ 41. 2, 41.3; *see also Harsh Investment Corp. v. City and County of San Francisco*, C-94-0629-DLJ (June 21, 1994) (finding that the HCO serves a legitimate governmental purpose); *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 690 (9th Cir. 1993). Because, on its face, the HCO and Planning Code substantially advances a legitimate government interest, both meet the substantial advancement test.

The HCO and Planning Code also meets the second prong of the regulatory takings test, in that it does not deprive hotel owners of all economically beneficial use of their property. *See, e.g., Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 128-130 (1978). There is some discrepancy among the Courts and commentators as to what constitutes a prohibition of "all economically beneficial use" of property. Some circuits have found that courts can and should separately analyze each "stick[] in the bundle of rights that are commonly characterized as property," *Dolan v, City of Tigard*, 114 S.Ct. at 2316, to determine whether the

regulation at issue effects a takings of a given stick. *See Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1572 n.32 (Fed. Cir. 1994) (suggesting that the many variants of property rights should be analyzed separately for a regulatory takings just as is done for a physical takings), *cert. denied*, 115 S.Ct. 898 (1995). More commonly, however, courts applying this test adhere to the more traditional approach articulated in *Penn Central, supra*, 98 S.Ct. at 2662, where the Supreme Court emphasized that regulatory takings jurisprudence "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. *Id.* at 1248; *see also Concrete Pipe & Prods v. Construction Laborers Pension Trust*, 113 S.Ct. 2264, 2290 (1993).

Considering plaintiffs' entire bundle of property rights, the HCO and Planning Code do not effect a destruction of all economically viable use of the San Remo hotel. The terms of the Ordinances leave residential hotel owners free to rent rooms to residential tenants or to apply to convert their buildings to commercial use, and there is simply no evidence before this Court that the replacement housing exaction fee deprives all subject property owners of the viable commercial use of their property. As such, this Court would not conclude that the HCO and Planning Code constitute a facial takings.

Finally, the HCO, even if considered in conjunction with the NBNCD, does not authorize a compelled physical invasion of hotel property. At least on the face of the two ordinances, there is nothing which requires plaintiffs to rent their residential units to tenants. *See HCO* §§ 41.19, 41.20(a). Moreover, as the California court determined in *Bullock*, California's Ellis Act, Cal. Govt. Code § 7060 et seq., protects a property owner's plan "to go out of the residential hotel business." 221 Cal. App. 3d at 1099. The plaintiff in

Bullock argued that the exaction fee required by San Francisco's HCO was a "ransom" which could not be applied to prevent an owner from going out of the residential hotel business. The court ruled that "[t]he Ellis Act does not permit [the City of San Francisco] to condition plaintiff's departure upon the payment of ransom." *Id.* at 1101. The court also noted, however, that "[t]he City retains an amplitude of powers, which are expressly recognized in the Ellis Act, that may be relevant insofar as the City may see fit 'to regulate the subsequent use of the property following its removal from the rental market.'" *Id.* at 1102 (internal citations omitted).] Where the "right to exclude" tenants is not taken from a landowner, no physical invasion of the landowner's property has occurred. *See Yee*, 112 S.Ct. at 1528. Thus, because the HCO and Planning Code merely regulates plaintiffs, use of their land, it does not effect a physical takings.

E. Pacific Legal Foundation's Additional Arguments

In addition to the arguments addressed above, PLF raises two additional arguments.

One, PLF argues that California Courts provide an inadequate forum, depart from the constitutional safeguards mandated by the Supreme Court, and are hostile to federal takings claims. The Ninth Circuit has rejected this argument. *See Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1403 (9th Cir. 1989), *overruled by Armendariz v. Penman*, 75 F.3d 1311 (9th Cir.1996), *rev'd on other grounds*. It was not "swayed by the alleged 'reluctance of the California State Court system to lend a sympathetic ear to private property owners in just compensation cases'." *Id.* Similarly, this Court rejects PLF's conclusory argument. California Courts consistently consider and analyze under appropriate federal standards cases arising under the Takings

Clause of the Fifth Amendment. *See e.g., San Remo II*, 27 Cal.4th at 664-71; *Bullock v. City and County of San Francisco*, 221 Cal.App.2d 1072, 1089 (1990); *Gilbert v. State of California*, 218 Cal App.3d 234, 253-254 (1990); *Leppo v. City of Petaluma*, 20 Cal.App.3d 711, 719, (1971).

Two, PLF argues that the California Supreme Court decision should not be given preclusive effect because the Court deemed it to have none. The PLF points to the footnote in the beginning of the case where the Court stated it did not decide any federal questions. However, as mentioned previously, the Court contradicted this footnote throughout the decision and clearly stated it was applying and deciding the case based on federal law throughout the decision and in its holding (See section (II) (C) (1) of this memorandum). Thus, PLF's argument is rejected.

III. CONCLUSION

For the foregoing reasons, the Court hereby GRANTS defendants' motion to dismiss plaintiffs' Amended Complaint with leave to amend.

The Court finds that:

1. Both plaintiffs' facial and as-applied federal takings claims with respect to the Planning Code and the conditional use permit must be considered by the Court.

2. Plaintiffs' facial takings claim to the HCO is time-barred.

3. Plaintiffs' facial takings claim to the HCO is additionally barred under the doctrine of issue preclusion.

4. Plaintiffs' failed to properly allege an as-applied takings claim to the HCO, However if properly alleged, an as-applied takings challenge to the HCO is time-barred.

5. Plaintiffs' facial takings claim to the Planning Code is time-barred.

6. Plaintiffs' failed to properly allege an as-applied takings claim to the Planning Code. However, if properly alleged, an as-applied takings claim to the Planning Code is not time-barred.

7. Plaintiff is granted leave to amend to allege an as-applied takings claim to the Planning Code. Any amended complaint must be filed within 30 days of the date of this Order.

IT IS SO ORDERED

Dated: October 15 , 2002

/s/ _____
D. Lowell Jensen
United States District Judge

APPENDIX E

SUPREME COURT OF CALIFORNIA

No. S091757

[Filed March 4, 2002]

SAN REMO HOTEL L.P. et al.,
Plaintiffs, Cross-defendants and Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO et al.,
Defendants, Cross-complainants and Respondents.

On Appeal From
Superior Court of the City and County of San Franscisco
Super. Ct. No. 950166
Ina Levin Gyemant, William J. Cahill, and Raymond D. Williamson, Jr., Judges

Court of Appeals of California, First Appellate District,
Division Five. No. A083530

OPINION

WERDEGAR, J.

Plaintiffs, the owners and operators of the San Remo Hotel in San Francisco, sought approval from the City and County of San Francisco to rent all rooms in the San Remo Hotel to tourists or other daily renters, rather than to longer term residents. Plaintiffs eventually received approval but, in the process, were required to (1) comply with zoning laws by obtaining a conditional use permit for use of their property as a tourist hotel, and (2) help replace the residential units San Francisco claimed would be lost by the conversion, pursuant to the city's Residential Hotel Unit Conversion and Demolition Ordinance (S.F. Admin. Code, ch. 41) (hereafter the HCO), which plaintiffs elected to do by paying an in lieu fee into a governmental fund for the construction of low and moderate-income housing.

Plaintiffs challenged the conditional use permit requirement by petition for writ of administrative mandate (Code Civ. Proc., § 1094.5), pled as the first cause of action in their second amended complaint, and challenged the housing replacement requirement by four additional causes of action alleging the taking of private property without just compensation in violation of article I, section 19 of the California Constitution.[1] The trial court denied the writ petition and sustained a demurrer to the takings counts. The Court of Appeal reversed.

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[1] Plaintiffs sought no relief in state court for violation of the Fifth Amendment to the United States Constitution. They explicitly reserved their federal causes of action. As their petition for writ of mandate, as well, rests solely on state law, no federal question has been presented or decided in this case.

Based on the administrative record and the pleadings, and guided by established legal principles, we conclude the trial court properly denied the petition for writ of administrative mandate and sustained the demurrer as to the remaining causes of action. We will therefore reverse the judgment of the Court of Appeal insofar as the appellate court reversed the trial court's judgment for defendant City and County of San Francisco.

I. BACKGROUND

Plaintiffs are San Remo Hotel L.P., a limited partnership; its general partner, T & R Investment Corp.; and its limited partners, Thomas and Robert Field. Defendants are the City and County of San Francisco, and the various agencies and agents through which it acted (collectively the City, or San Francisco).

Because the proceedings below turned on the application and validity of two bodies of local San Francisco law, we first summarize those ordinances.

A. *The San Francisco Hotel Conversion Ordinance*

The HCO, codified in chapter 41 of the San Francisco Administrative Code, was first enacted in 1981 (S.F. Ord. No. 330-81) and was substantially revised in 1990 (S.F. Ord. No. 121-90).[2] Its purpose is to "benefit the general public by minimizing adverse impact on the housing supply and on displaced low income, elderly, and disabled persons resulting from the loss of residential hotel units through their

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[2] Unless otherwise specified, all references to the HCO are to the 1990 version of the ordinance.

conversion and demolition." (HCO, § 41.2.) Accompanying the ordinance are findings that the City suffers from a severe shortage of affordable rental housing; that many elderly, disabled and low-income persons reside in residential hotel units; that the number of such units had decreased by more than 6,000 between 1975 and 1979; that loss of such units had created a low-income housing "emergency" in San Francisco, making it in the public interest to regulate and provide remedies for unlawful conversion of residential hotel units; that the City had instituted a moratorium on residential hotel conversion effective November 21, 1979; and that because tourism is also essential to the City, the public interest also demands that some moderately priced tourist hotel rooms be available, especially during the summer tourist season. (HCO, § 41.3.)

Each hotel room's initial status for purposes of the HCO was determined by having the owner or operator of each hotel file an initial unit usage report stating the number of residential and tourist units in their hotel as of September 23, 1979. (HCO, § 41.6, subd. (b)(1).) The HCO defines a "Residential Unit" as a "guest room" that was occupied by a "permanent resident" on September 23, 1979, or that was designated residential under section 41.6's procedures for initial status determination. (HCO, § 41.4, subd. (q).) A "Tourist Unit" is defined as a guest room *not* occupied by a permanent resident on September 23, 1979, or a guest room certified as a tourist unit under section 41.6. (HCO, § 41.4, subd. (s).) A permanent resident is a person who occupies a guest room for at least 32 consecutive days. (*Id.*, subd. (n).)

The HCO makes it unlawful to eliminate a residential hotel unit without obtaining a conversion permit or to rent a residential unit for a term shorter than seven days. (HCO,

§ 41.20, subd. (a).) Violators are subject to civil penalties. (*Id.*, subd. (c).)

An application to convert residential units to tourist use must include, inter alia, "[a] statement regarding how one-for-one replacement of the units to be converted will be accomplished." (HCO, § 41.12, subd. (b)(9).) The applicant may satisfy the replacement requirement by constructing or bringing onto the market new residential units comparable to those converted (HCO, § 41.13, subd. (a)(1),(2)); constructing or rehabilitating certain other types of housing for low-income, disabled or elderly persons (*id.*, subd. (a)(3)); or paying to a public or nonprofit housing developer, or to the City's Residential Hotel Preservation Fund Account, an in lieu fee equal to the replacement site acquisition costs plus a set portion of the replacement construction costs (*id.*, subd. (a)(4),(5)).[3] The replacement costs are to be determined by the City's Department of Real Estate based on two independent appraisals. (HCO, § 41.13, subd. (a)(4), (5).)

The 1981 and 1990 versions of the HCO differ in their treatment of temporary tourist rentals of residential units. The 1981 ordinance allowed summer season rentals (May 1 to September 30) of vacant residential units without numerical restriction, with the proviso that the room "shall immediately revert to residential use on application of a prospective permanent resident," but contained no provision for winter tourist rentals. (1981 HCO, § 41.16, subd. (a)(3)(B).) The

[3] The 1990 revision raised the portion of construction costs to be paid by the applicant from 40 to 80 percent. (1981 HCO, § 41.10, subd. (a)(4); 1990 HCO, § 41.13, subd. (a)(4), (5).) Plaintiffs, however, apparently applied during a "window" period (1990 HCO, § 41.13, subd. (d)) qualifying them for the 40 percent rate.

1990 revision additionally restricted summer tourist rentals of residential units by, among other things, limiting such rentals, absent special permission from the City's Bureau of Building Inspection,[4] to 25 percent of a hotel's residential rooms. (HCO, § 41.19, subd. (a)(3).) The revision, however, also allowed a limited number of residential rooms to be rented to tourists during the winter months as well. (*Id.*, subd. (c).)

B. *The San Francisco Planning Code*

In 1987, San Francisco adopted article 7 of its Planning Code, a set of zoning regulations for "neighborhood commercial districts." (S.F. Planning Code, § 701, added by S.F. Ord. No. 69-87.) The San Remo Hotel is within the North Beach neighborhood commercial district (hereafter North Beach district), created in 1987. The North Beach district "functions as a neighborhood-serving marketplace, citywide specialty shopping, and dining district, and a tourist attraction, as well as an apartment and residential hotel zone." (S.F. Planning Code, § 722.1.) While most new commercial development is permitted on the first two stories of buildings, new housing development is encouraged above the second story and "[e]xisting residential units are protected by prohibitions of upper-story conversions and limitations on demolitions." (*Ibid.*)

Tourist hotels are a conditional use in the North Beach district. (S.F. Planning Code, § 722.55.) "Conditional uses are permitted in a Neighborhood Commercial District when

[4] The Bureau of Building Inspection is now known as the Department of Building Inspection. For clarity, we shall generally refer to the Department as the Bureau, the name operative at the time of most of the events related herein.

authorized by the Planning Commission . . . . Conditional uses are subject to the provisions set forth in Sections 178, 179, and 316 through 316.8 of this Code." (S.F. Planning Code, § 703.2, subd. (b)(1)(B).)

A "permitted conditional use," the zoning category into which plaintiffs, before the City's zoning administrator, claimed the San Remo Hotel's tourist rental fell, is defined generally in San Francisco Planning Code sections 178 and 179. Generally, a permitted conditional use is defined, inter alia, as "[a]ny use or feature which is classified as a conditional use in the district in which it is located and which lawfully existed either on the effective date of this Code, or on the effective date of any amendment imposing new conditional use requirements upon such use or feature." (S.F. Planning Code, § 178, subd. (a)(2).) As to neighborhood commercial districts, a permitted conditional use is "[a]ny use or feature in a Neighborhood Commercial District which lawfully existed on the effective date of Ordinance No. 69-87 which is classified as a conditional use by the enactment of Ordinance No. 69-87." (S.F. Planning Code, § 179, subd. (a)(2).)

A permitted conditional use may continue "in the form in which it lawfully existed" on the effective date of the new conditional use requirement. (S.F. Planning Code, § 178, subd. (b).) But a permitted conditional use "may not be significantly altered, enlarged, or intensified, except upon approval of a new conditional use application." (*Id.*, subd. (c).)

"Residential conversion," defined as the change in occupancy from residential to nonresidential use (S.F. Planning Code, § 790.84), is prohibited above the first floor in the North Beach district. (S.F. Planning Code, § 722.38.) The Planning Code's definition of residential conversion, however, "shall not apply to conversions of residential hotels, as defined and regulated in [the HCO]." (S.F. Planning Code, § 790.84.)

C. *Factual Background*

One of plaintiffs' causes of action, the petition for writ of administrative mandate, was decided on an administrative record, while the other counts were dismissed on demurrer. On review of the latter ruling we, like the trial court, may consider only the factual allegations of the complaint and matters subject to judicial notice (Code Civ. Proc., § 430.30, subd. (a)), and not the administrative record. We therefore summarize the factual background of the writ petition separately from that of the remaining counts.

1. *The Petition for Writ of Administrative Mandate*

By their petition, pled as the second amended complaint's first cause of action, plaintiffs sought to overturn the City's administrative determination that, under the San Francisco Planning Code, plaintiffs were required to obtain a conditional use permit in order to use all rooms in the San Remo Hotel for tourist rentals. Plaintiffs allege that the City's zoning administrator, in a decision affirmed by the City's Board of Permit Appeals,[5] should have classified the proposed tourist

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[5] The Board of Permit Appeals is now known as the Board of Appeals. For clarity, we shall continue to use the earlier name as it was the name operative at the time of most of the events related

use of the San Remo Hotel as a permitted conditional use under section 179, subdivision (a)(2) of the Planning Code. Plaintiffs prayed for a peremptory writ of mandate directing the City to "recognize and acknowledge" that tourist use of the San Remo Hotel "is a permitted conditional hotel use."

The administrative record shows the following:

> On September 25, 1981, Jean Iribarren, then operating the San Remo Hotel under a lease from plaintiffs Thomas and Robert Field, filed the initial unit usage report required under the HCO. He reported the San Remo Hotel had 61 units in residential use both as of September 23, 1979, and seven days prior to filing the report, and zero units in tourist use on the same dates. On November 18, 1981, the Bureau of Building Inspection issued Iribarren a certificate of use reflecting the same usage numbers. According to a 1992 declaration by plaintiffs Thomas and Robert Field, Iribarren filed the "incorrect" initial unit usage report without their knowledge. They first discovered the report in 1983 when they resumed operation of the hotel. They protested the residential use classification in 1987, but were told it could not be changed because the appeal period had passed.
>
> On September 9, 1992, the Zoning Administrator of the San Francisco Department of City Planning, responding to plaintiffs' request for a written ruling, determined that operation of the San Remo as a tourist hotel was not a permitted conditional use under section 179, subdivision (a)(2) of the San Francisco

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herein.

> Planning Code. The ruling observes that beginning in May 1982, the San Remo Hotel was included in interim zoning districts requiring conditional use permits for operation of tourist hotels. That requirement became permanent in April 1987 with the establishment of the North Beach district. Planning Code section 790.47 defines a residential hotel as a hotel containing one or more residential units, a term defined by reference to the HCO. Because under the HCO all 62 units in the San Remo Hotel were classified as residential, its zoning classification was also as a residential hotel (a type of "group housing" under the Planning Code).[6]

The zoning administrator considered, but rejected, plaintiffs' claim that because they rented vacant rooms in the San Remo Hotel to tourists during the summer (permitted under the HCO with some conditions), and in some cases in the winter as well (permitted with special approval under the 1990 HCO), they operated a tourist hotel. According to the administrator, "[s]uch temporary authorization for tourist uses does not constitute a change of use and therefore all of the units in the Hotel remain residential units." The zoning administrator further found that, according to annual unit usage reports submitted by the San Remo Hotel to the Bureau of Building Inspection, between 25 and 57 units in the hotel were in fact occupied by residents from 1982 to 1992. Even if only these units were considered residential, and the remaining units deemed to have been in tourist use when the

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[6] The administrative record does not explain the variance between the 61 rooms initially certified by the Bureau of Building Inspection in 1981 and the 62 rooms referred to by the zoning administrator in 1992. The parties appear to agree the hotel now contains 62 rooms.

conditional use permit requirement took effect, the administrator ruled, plaintiffs would still be required to obtain a conditional use permit to convert the hotel to complete tourist use, because under San Francisco Planning Code section 178, subdivision (c), a permitted conditional use may not be significantly altered, enlarged or intensified without new conditional use authorization.

Hotel tax returns also indicate mixed residential and tourist use. Of the $ 60,942 in gross rent the San Remo Hotel earned in the quarter ending December 31, 1988, $56,676 was rent for occupancy by permanent residents (not subject to the hotel tax). For the first quarter of 1989, $33,897 of the hotel's $ 57,563 gross rent was from residential rentals. Even in the summer, a significant portion of the hotel's rental revenue was residential: for the quarter ending September 30, 1989, gross rent was $121,117, of which $34,469 was earned from residential rentals. According to a May 1991 decision of the Bureau of Building Inspection hearing officer approving plaintiffs' request to rent more than 25 percent of their rooms to tourists in the 1991 summer season, plaintiffs had presented evidence that in May 1991, 30 San Remo Hotel guests had occupied their rooms "for periods ranging from two months to ten years." Nine more had rented for more than a week, but less than a month.

The Board of Permit Appeals upheld the zoning administrator's determination that a conditional use permit was required to change the San Remo Hotel's use to a tourist hotel.

2. *The Takings Causes of Action*

In their remaining causes of action, plaintiffs allege that the HCO, and the various actions of City agencies requiring plaintiffs to comply with that ordinance, constituted a taking in violation of the California Constitution. **(1)** In reviewing a dismissal following the trial court's sustaining of a demurrer, we take the properly pleaded material allegations of the complaint as true. (*ABC Internat. Traders, Inc. v. Matsushita Electric Corp.* (1997) 14 Cal. 4th 1247, 1253 [61 Cal. Rptr. 2d 112, 931 P.2d 290]; *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal. 4th 962, 966-967 [9 Cal. Rptr. 2d 92, 831 P.2d 317].)

Plaintiffs allege the following as to the hotel's legal status and history. "From 1916 to the present, the guest rooms in the San Remo Hotel have been rented primarily to transient and tourist guests on a commercial basis." Fewer than 20 percent of the rooms are, or were on August 5, 1987 (the effective date of the neighborhood commercial district zoning ordinance), occupied as primary residences. When plaintiffs purchased the San Remo Hotel in 1970, it was zoned C-2 commercial, with no restrictions on its use as a tourist hotel. After plaintiffs spent more than $250,000 on repairs and renovations, the City issued them a permit of occupancy for a 62-room hotel. From 1970 on, the City issued plaintiffs a hotel license and collected hotel taxes on the transient rental of the San Remo Hotel's rooms.

After the 1990 revision of the HCO, which revised the 1981 ordinance to place additional significant restrictions on tourist rental of residential rooms, plaintiffs applied under the HCO to "convert" to tourist use all the San Remo Hotel's rooms designated residential. The City's Planning Department told them they also had to apply for a conditional use permit

for the conversion to be allowed under the zoning laws. The planning commission subsequently granted plaintiffs' application for a conditional use permit on three conditions: plaintiffs were to mitigate the loss of housing by complying with the HCO's housing-replacement provisions, offer current long-term residents lifetime leases, and obtain variances from floor-area ratio and parking requirements. Plaintiffs appealed the imposition of these conditions, but the City's Board of Supervisors upheld the planning commission's decision. Plaintiffs ultimately satisfied the conditions, paying a $567,000 in lieu fee assessed by the Department (formerly the Bureau) of Building Inspection, which thereafter issued a permit for full tourist use of the hotel.

The second amended complaint alleges a taking, in violation of the California Constitution, in the City Planning Commission's requirement that plaintiffs pay a housing-replacement fee as a condition of receiving a conditional use permit. Plaintiffs claim that imposition of the fee "fails to substantially advance a legitimate government interest" and that "[t]he amount of the fee imposed is not roughly proportional to the impact" of the proposed tourist use of the San Remo Hotel. They further allege that "the requirement that plaintiffs pay the City $567,000 to obtain an HCO permit to convert" constituted a taking of their property without just compensation, entitling them to a refund of the fee, and that the City's regulatory scheme as a whole and its application to the San Remo Hotel constituted a taking in violation of the California Constitution. The prayer is for damages of $567,000 plus interest from December 11, 1996 (apparently the date the fee was paid), and other damages according to proof.

D. *Decisions of the Trial Court and Court of Appeal*

The trial court sustained the City's demurrer to the second through fifth causes of action. Some causes of action were, the court held, barred by *Pfeiffer v. City of La Mesa* (1977) 69 Cal. App. 3d 74 [137 Cal. Rptr. 804], in which the appellate court held that an applicant's compliance with building permit conditions barred a later action for damages resulting from imposition of the conditions. The remaining causes of action challenging the constitutionality of the HCO failed, the court concluded, because the HCO, as a legislative regulation, was not subject to the heightened scrutiny outlined in *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825 [107 S. Ct. 3141, 97 L. Ed. 2d 677] (*Nollan*) and *Dolan v. City of Tigard* (1994) 512 U.S. 374 [114 S. Ct. 2309, 129 L. Ed. 2d 304] (*Dolan*).

Subsequently, after hearing argument directed to the writ petition, but without receiving evidence outside the administrative record, the trial court denied the requested writ of administrative mandate. Whether reviewed on the substantial evidence or independent judgment test, the court found, the Board of Permit Appeals' decision finding the San Remo Hotel was in residential use, thus requiring a conditional use permit for use as a tourist hotel, must be upheld. The trial court relied primarily on the City's 1981 issuance of a certificate of use designating all rooms in the hotel residential, concluding therefrom that "residential use of the San Remo was the only lawful use." Plaintiffs' temporary tourist rental of vacant rooms designated residential, as permitted under the HCO, the court held, did not effect a change of use under the zoning law.

Having denied the writ sought by the first cause of action and sustained a demurrer to the remaining counts without

leave to amend, the trial court entered judgment for the City on plaintiffs' complaint.[7]

The Court of Appeal reversed. The City's demurrer should have been overruled, the appellate court held, because plaintiffs pled facts showing that the HCO, as applied to require payment of the $567,000 conversion fee, effected a taking under the Fifth Amendment to the United States Constitution and article I, section 19 of the California Constitution. The claim of a taking in exaction of the in lieu fee was one to which "*Nollan/Dolan/Ehrlich*[8] heightened or intermediate scrutiny analysis" should apply, because "the monetary sum of $567,000 exacted by the City here is a fee, exaction or payment in a 'discretionary context' which presents 'an inherent and heightened risk that local government will manipulate the police power' in a manner which 'avoid[s] what would otherwise be an obligation to pay just compensation.' (*Ehrlich*, *supra*, 12 Cal. 4th at p. 869.)" The fee failed both the "essential nexus" and "rough proportionality" parts of that test, the Court of Appeal concluded, because it was based on the "fiction" of full residential use created by the 1981 survey and certificate of use.[9]

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[7] Judgment was also entered for the City on its cross-complaint for penalties under the HCO, but as no issue regarding the cross-complaint is before us on review, that action need not be described further.

[8] *Nollan*, *supra*, 483 U.S. 825; *Dolan*, *supra*, 512 U.S. 374; *Ehrlich v. City of Culver City* (1996) 12 Cal. 4th 854 [50 Cal. Rptr. 2d 242, 911 P.2d 429] (*Ehrlich*).

[9] The Court of Appeal held *Pfeiffer v. City of La Mesa*, *supra*, 69 Cal. App. 3d 74, upon which the trial court partially relied,

With regard to the writ petition, the Court of Appeal reversed and remanded for factual determinations. The trial court erred, the Court of Appeal held, in holding that the City's classification of all rooms in the San Remo Hotel as residential rendered any tourist use unlawful for purposes of zoning. "The City's local zoning laws applicable to hotels in the early 1980's made no distinction between the use permits for hotels based upon their 'residential' or 'tourist' status under the HCO. Thus, such Hotel rentals to tourists in the 1980's would have been legal, under the City's planning code then in effect. We therefore conclude that the Hotel could be an existing legal nonconforming use under the [North Beach district], notwithstanding the 1981 certificate of use." Because the trial court, believing prior tourist use would have been unlawful, had not determined its historical existence, the Court of Appeal remanded for further factual findings by the trial court or administrative agency concerning actual use of the hotel.

We granted the City's petition for review.

II. DISCUSSION

With the above background, we may proceed to resolve the issues raised by the parties. We address, first, the correctness of the trial court's denial of the petition for writ of administrative mandate; second, the proper level of scrutiny applicable to plaintiffs' claim that the HCO housing-

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inapposite for several reasons, including that it predated enactment of the Mitigation Fee Act (Gov. Code, § 66000 et seq.), which allows a developer to pay a mitigation fee under protest and subsequently litigate its validity. As the City did not challenge this holding in its petition for review or its brief on the merits in this court, its correctness is not before us.

replacement fee constituted a taking of their property without just compensation; and third, the merits of plaintiffs' facial and as-applied attacks on the HCO.

A. *Did San Francisco Properly Require Plaintiffs to Obtain a Conditional Use Permit for Full Tourist Use of the Hotel?*

(2) As already explained, San Francisco's zoning administrator, in a decision affirmed by the Board of Permit Appeals, determined that the proposed operation of the San Remo Hotel in full tourist use required plaintiffs to apply for and obtain a conditional use permit. After analysis, we conclude the trial court correctly denied the petition for writ of administrative mandate challenging this administrative decision.

Before the zoning administrator and in the trial court, plaintiffs contended that no conditional use permit was needed because tourist rental of the hotel was a permitted conditional use under the San Francisco Planning Code. A permitted conditional use in a neighborhood commercial district must have "lawfully existed" on the effective date of the 1987 neighborhood commercial district ordinance. (S.F. Planning Code, § 179, subd. (a)(2).) Section 178, subdivision (a)(2) of the same code defines the same term, in its more general application, as a use that "lawfully existed" at the time such uses became subject to a conditional use permit requirement. Although plaintiffs, echoing the Court of Appeal, focus on the "lawfulness" of tourist use under the 1981 HCO, a prior consideration is whether, and to what extent, tourist use of the San Remo Hotel "existed" as of 1987 or as of the time the San Remo first became subject to a conditional use permit requirement for tourist use, apparently by interim measures first added in 1982.

The administrative record shows that both residential and tourist rentals were significant uses of the San Remo Hotel at the relevant times. The zoning administrator cited annual unit usage reports filed by the San Remo Hotel with the Bureau (and later, the Department) of Building Inspection, which showed that during the period 1982 to 1992, between 25 and 57 units in the 62-unit hotel were occupied by residents. City hotel tax records from the last part of that period show that, even in the summer, a significant part of the San Remo's rental revenue was derived from (nontaxable) residential rentals, which constituted the majority of revenues in some autumn and winter seasons. As of May 1991, according to a hearing officer's decision allowing summer tourist rentals at the San Remo Hotel, some San Remo residents had occupied their rooms for as long as 10 years. A similar ruling in May 1989 noted that 15 to 20 of the residents then living at the San Remo had been there for six months or longer, some for "many years." Thus, the record supports the Board of Permit Appeals' finding that the San Remo Hotel was operated "at least in part" as a residential hotel in the early and mid-1980's.

In their application for HCO conversion, plaintiffs sought *not* to maintain the status quo but, in the words of their complaint, to "convert the San Remo Hotel's residentially designated hotel rooms [i.e., all the hotel's rooms] to tourist use." That application, according to plaintiffs, prompted the City to require a conditional use permit. Thus, as the zoning administrator understood plaintiffs' application, they sought authorization "to convert all of the units of the hotel to tourist use."

The zoning administrator correctly determined that such conversion required a conditional use permit even if some tourist use had previously lawfully existed. A permitted

conditional use may continue "in the form in which it lawfully existed," but "may not be significantly altered, enlarged, or intensified, except upon approval of a new conditional use application." (S.F. Planning Code, § 178, subds. (b), (c).) Clearly a change from *partial* tourist use to *complete* tourist use would be a significant alteration or enlargement of the existing use, requiring a new conditional use permit.

We agree with plaintiffs that the superior court erred in stating, "The only lawful use of the San Remo . . . was residential." The 1981 version of the HCO allowed vacant residential units to be rented on a short-term basis during the May to September tourist season. Since such rentals were also permitted under the San Remo Hotel's historical zoning (i.e., that preceding the 1982 and 1987 zoning changes), some tourist use lawfully existed prior to the 1982 and 1987 zoning restrictions. But the lawful *temporary* rental of *vacant* residential units, permitted with the further restriction that such units must immediately revert to residential use if needed (1981 HCO, § 41.16, subd. (a)(3)(B)), was not authority to use the hotel's rooms *full time* for tourist use, regardless of residential occupancy or demand. As the superior court observed, "This temporary tourist use is not a change of use under the Planning Code." Again, such full-time unrestricted tourist rental would be a significant alteration or enlargement of the historical lawful use, requiring new conditional use permission under San Francisco Planning Code section 178, subdivision (c). Plaintiffs do not claim that the actual tourist use of the San Remo Hotel went beyond that permitted by the HCO, nor does the record contain evidence of such illegally extensive use in the relevant period; indeed, plaintiff Robert Field stated in the trial court that plaintiffs had always complied with the HCO. Even as to those rooms that had, on occasion, been lawfully rented to tourists, therefore, the zoning administrator and Board of Permit Appeals were

correct to require a conditional use permit for permanent tourist use.

Plaintiffs attribute to the City the argument that "the San Remo Hotel's zoning classification as a tourist hotel was changed by the 1981 [HCO]." To rebut the City's supposed claim, plaintiffs cite a 1981 opinion letter by the San Francisco City Attorney that stated the then proposed HCO was not a zoning law and thus could be enacted without a hearing before the San Francisco Planning Commission. (S.F. City Atty., Opn. No. 81-54 (Sept. 14, 1981) pp. 7-8.) In reply, the City disavows any claim that the HCO changed the San Remo Hotel's zoning status, but insists that "the trial court correctly considered the HCO as a legal restriction on the use of the hotel." As we have explained, however, the critical issue in this case is *not the lawfulness* of the historical tourist use, *but its extent*. The HCO's restrictions on tourist use are pertinent in that they limited the hotel's actual tourist use during the 1980's. But, as plaintiffs do not claim they engaged in any tourist use beyond what the HCO permitted, and the record shows no such unauthorized use before 1987, we are not concerned here with whether tourist rentals in violation of the HCO would or would not have constituted a "lawful" use for purposes of the Planning Code provisions on permitted conditional uses. The record demonstrates that prior to 1987 the San Remo Hotel had substantial residential use and, as plaintiffs do not dispute, tourist use was restricted, in compliance with the HCO, to summer rentals of vacant units. Conversion to complete full-time tourist use would therefore be a significant expansion of the hotel's historical tourist use, requiring a conditional use permit. Nothing in the City

Attorney's 1981 opinion alters our analysis or affects our conclusion.[10]

The Court of Appeal also criticized the City (i.e., the zoning administrator and the Board of Appeals) for characterizing the San Remo Hotel's historical residential use as "group housing" when, at the same time, the San Remo operated under a City-issued "hotel" permit and paid "hotel" taxes. In response, the City cites a zoning provision (S.F. Planning Code, § 209.2, subd. (a)), added in 1978, that defines the housing use category "Group housing, boarding," in a manner that, on its face, arguably includes a residential hotel. But another part of the same section, also dating from 1978, defines the use "Hotel, inn or hostel," in a manner that

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[10] The parties and the Court of Appeal address, at points, the question whether tourist use of the San Remo Hotel qualifies as a "lawful nonconforming use." Like a permitted conditional use, a lawful nonconforming use is one that existed lawfully at the time a new zoning prohibition or restriction came into force, the difference being that a permitted conditional use is conditionally *permitted* by the new zoning law, while a nonconforming use is *prohibited* by that law. (*See* S.F. Planning Code, §§ 178, subd. (a)(2), 180, subd. (a)(1); *Hansen Brothers Enterprises, Inc. v. Board of Supervisors* (1996) 12 Cal. 4th 533, 540, fn. 1 [48 Cal. Rptr. 2d 778, 907 P.2d 1324].) Since tourist hotels are a conditionally permitted, rather than a prohibited, use in the North Beach district (S.F. Planning Code, § 722.55), a tourist use, if it had lawfully existed before the neighborhood commercial district restrictions became effective, would be classified as a permitted conditional use rather than a lawful nonconforming use. But regardless of terminology, the same result obtains in this case, since the rule against expansion or alteration of an existing use applies to nonconforming uses as well as to permitted conditional uses. (S.F. Planning Code, §§ 178, subd. (c), 181, subd. (a); *Hansen Brothers Enterprises, Inc.*, *supra*, at p. 552.)

includes the San Remo Hotel's historic use *if* the San Remo's rooms were, during the relevant period, used "*primarily* for the accommodation of transient overnight guests" (*id.*, subds. (d), (e), italics added), a question not clearly answered by the administrative record excerpt in the appellate record. Nor does the 1978 law appear to preclude a mixed-use hotel from having both classifications.

Fortunately, we need not determine the correct zoning categorization of the San Remo Hotel's pre-1987 use in order to decide this case. The question before us is whether plaintiffs' proposed full tourist use of the hotel qualifies as a permitted conditional use under the current zoning laws. As we have seen, such use does qualify to the extent it lawfully existed when the current laws' restrictions came into effect, but does not qualify to the extent plaintiffs propose to significantly alter or expand it. This is true regardless of whether the San Remo was historically classified as a hotel, as group housing, or both.

In classifying uses for purposes of neighborhood commercial district zoning, we are directed to consider separately each use in a multiple-use structure. (S.F. Planning Code, § 703.2, subd. (b)(1).) That the San Remo might legitimately have been classifiable as a "Hotel, inn or hostel" under the 1978 zoning law (*id.*, § 209.2, subd. (e)) or a "Hotel, tourist" under the 1987 neighborhood commercial district law (*id.*, § 790.46) *as well as* a "hotel, residential" (*id.*, § 790.47) is therefore not determinative. (*Cf. Tenderloin Housing Clinic, Inc. v. Astoria Hotel, Inc.* (2000) 83 Cal. App. 4th 139, 144, fn. 2 [98 Cal. Rptr. 2d 924] [hotel with 13 rooms designated for tourist use and 79 for residential use was both a tourist hotel and a residential hotel under the Planning Code].) The historical extent of tourist use itself determines the extent to which the San Remo Hotel can,

under current law, be put to that use without conditional use permits.

Both minority opinions misapprehend the factual context in which the conditional use permit was issued. The concurring and dissenting opinion, which would have us remand the case for factual findings (conc. & dis. opn., *post*, at pp. 683-684), proceeds on the incorrect assumption that conditional use permits are issued on a room-by-room basis, and that a determination of the precise number of rooms in tourist use when the conditional-use permit requirement came into effect would materially affect the permit requirement (*id.* at pp. 682-685). Contrary to suggestions in the concurring and dissenting opinion, the number of rooms for which a new tourist use was proposed is of no import as to whether a conditional use permit was required in the first instance, so long as some expansion of tourist use was proposed. Nor did the conditional use permit specify the number of rooms subject to one-to-one replacement under the HCO, calculate the in lieu replacement fee to be assessed, or impose any other condition dependent on the number of rooms previously in tourist use. Because the record shows *some residential use* at all relevant times, and because plaintiffs' tourist use of the hotel was, as required under the HCO, *temporary* and *subject to preemption by residential demand*, a conditional use permit was required regardless of the exact number of rooms being rented to tourists at any time. Hence, no basis exists for "grandfather[ing]" tourist use in either the entire hotel or individual rooms as a permitted conditional use, as the concurring and dissenting opinion argues should have been done. (Conc. & dis. opn., *post*, at pp. 682-685.)

The dissent argues at length that the City Planning Commission acted in violation of the state Ellis Act (Gov. Code, §§ 7060- 7060.7), which allows the withdrawal of

residential accommodations from the market. (Dis. opn., *post*, at pp. 694-695, 698-699.) This argument founders on the stubborn fact that, so far as the record or briefing here shows, plaintiffs never took the measures necessary to invoke their statutory rights under the act. (*See* Gov. Code, § 7060.4 [permitting local governments to establish notice requirements for withdrawal of accommodations]; S.F. Admin. Code, § 7.9A(f) [establishing such notice requirements].) Hence, we have no occasion here to discuss the preemptive effect of the Ellis Act addressed in *Bullock v. City and County of San Francisco* (1990) 221 Cal. App. 3d 1072 [271 Cal. Rptr. 44], where the plaintiff hotel owner had "in no uncertain terms and in accordance with the [Ellis Act] procedures established by the City, advised the City of his intent to depart the business of renting residential hotel units." (*Id.* at p. 1100.) Nor, contrary to the dissent's suggestion, can the Ellis Act be read as occupying the fields of local real property regulation, zoning, or residential hotel regulation. (*See* Gov. Code, § 7060.1, subds. (b), (c).)

Similarly, the dissent's claim that "the planning commission chose to require HCO compliance and thereby used the leverage it gained . . . to exact a $567,000 fee" (dis. opn., *post*, at p. 696) misrepresents the facts in the appellate record. In their application for a conditional use permit, plaintiffs--who had already applied for a conversion permit under the HCO (see *ante*, at p. 656)--assured the planning commission that they would comply with the HCO. The commission incorporated that assurance as a condition of the permit, *but did not itself assess any fee*.

Because, as the administrative record demonstrates, tourist use of the San Remo Hotel before enactment of the conditional use requirements neither encompassed all the hotel's units nor occurred full time without regard to

residential occupancy and demand, plaintiffs' proposal to convert to full-time tourist use constitutes an expansion of the hotel's historical use requiring conditional use authorization. Consequently, the trial court correctly denied the petition for writ of administrative mandate, and the Court of Appeal erred in reversing this aspect of the trial court's judgment.

B. *Are In Lieu Fees Assessed Under the HCO Subject to Heightened Scrutiny?*

(3a) The takings clause of the California Constitution (art. I, § 19) provides: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." The federal takings clause (U.S. Const., 5th Amend.) provides: "nor shall private property be taken for public use without just compensation."

(4) By virtue of including "damage[]" to property as well as its "tak[ing]," the California clause "protects a somewhat broader range of property values" than does the corresponding federal provision. (*Hensler v. City of Glendale* (1994) 8 Cal. 4th 1, 9, fn. 4 [32 Cal. Rptr. 2d 244, 876 P.2d 1043]; accord, *Varjabedian v. City of Madera* (1977) 20 Cal. 3d 285, 298 [142 Cal. Rptr. 429, 572 P.2d 43]; see *Bacich v. Board of Control* (1943) 23 Cal. 2d 343, 350 [144 P.2d 818]; *Reardon v. San Francisco* (1885) 66 Cal. 492, 501 [6 P. 317].) But aside from that difference, not pertinent here, we appear to have construed the clauses congruently. (*See, e.g., Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal. 4th 952, 957, 962-975 [81 Cal. Rptr. 2d 93, 968 P.2d 993] (*Santa Monica Beach*) [takings challenge to rent control regulation under both clauses considered without separate discussion of the state clause]; *Hensler v. City of Glendale*, *supra*, at p. 9, fn. 4 [conclusion that U.S. Const., 5th Amend.

was not violated "applies equally" to Cal. Const., art. I, § 19].) Despite plaintiffs' having sought relief in this court only for a violation of article I, section 19 of the California Constitution, therefore, we will analyze their takings claim under the relevant decisions of both this court and the United States Supreme Court.

(5) "In determining whether a government regulation of property works a taking of property under the Fifth Amendment to the United States Constitution, the United States Supreme Court has generally eschewed any 'set formula' for determining whether a taking has occurred, preferring to engage in '"essentially ad hoc, factual inquiries"' (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015 [112 S. Ct. 2886, 2893, 120 L. Ed. 2d 798]), which focus in large part on the economic impact of the regulation (*see Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 124 [98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631]; *Keystone Bituminous Coal Assoc. v. DeBenedictis* (1987) 480 U.S. 470, 493-501 [107 S. Ct. 1232, 1246-1250, 94 L. Ed. 2d 472]). . . . Other than this ad hoc inquiry, the court has held categorically that property is taken when a government regulation 'compel[s] [a] property owner to suffer physical "invasion" of his property' or 'denies all economically beneficial or productive use of land.' (*Lucas*, *supra*, 505 U.S. at pp. 1015-1016 [112 S. Ct. at p. 2893].) The court has also stated that 'the Fifth Amendment is violated when a land-use regulation "does not substantially advance legitimate state interests."' (*Lucas*, *supra*, 505 U.S. at p. 1016 [112 S. Ct. at p. 2894].)" (*Santa Monica Beach*, *supra*, 19 Cal. 4th at p. 964.)

(3b) As in *Santa Monica Beach*, it is the last-mentioned prong of the high court's takings analysis that is at issue here. In particular, the parties debate whether a heightened level of

means-ends scrutiny, the force and application of which has been developed in *Nollan*, *supra*, 483 U.S. 825, *Dolan*, *supra*, 512 U.S. 374, *Ehrlich*, *supra*, 12 Cal. 4th 854, and *Santa Monica Beach*, *supra*, 19 Cal. 4th 952, applies to review of the conversion fee the City required plaintiffs to pay under the HCO.

In *Nollan*, a California agency conditioned its approval for the plaintiffs to rebuild a beachfront house on their dedication of a public easement providing lateral access across their portion of the beach. Although the easement would constitute a physical invasion of property, the high court recognized it could nonetheless be demanded as a condition of the development permit, if the permit could otherwise have been denied and if the easement condition "serve[d] the same legitimate police-power purpose as a refusal to issue the permit." (*Nollan*, *supra*, 483 U.S. at p. 836 [107 S. Ct. at p. 3148].) "The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition." (*Id.* at p. 837 [107 S. Ct. at pp. 3148-3149].) Without this "essential nexus," between the permit condition and the development ban, "the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" (*Ibid.*)

Because the conditional exaction in *Nollan* failed to meet "even the most untailored standards" (*Nollan*, *supra*, 483 U.S. at p. 838 [107 S. Ct. at p. 3149]), the court did not need to elucidate with any precision the required "fit" between the exaction and its purposes. But the court cautioned that, when the circumstances created a potential for the government to extort property by withholding otherwise unrelated permits, judicial scrutiny would be searching: "[O]ur cases describe the condition for abridgment of

property rights through the police power as a '*substantial* advanc[ing]' of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective." (*Id.* at p. 841 [107 S. Ct. at pp. 3150-3151].) "Thus in *Nollan*, the rule that the government's physical occupation of private property is a per se taking is transformed, in the context of a development application, into a rule of heightened scrutiny to ensure that a required development dedication is not a mere pretext to obtain or otherwise physically invade property without just compensation." (*Ehrlich*, *supra*, 12 Cal. 4th 854, 890 (conc. opn. of Mosk, J.).)

Dolan, like *Nollan*, involved a government agency's conditioning a development permit on dedication of a portion of the applicant's real property. In *Dolan*, the high court addressed the question it had reserved in *Nollan*, the "required degree of connection between the exactions and the projected impact of the proposed development." (*Dolan*, *supra*, 512 U.S. at p. 386 [114 S. Ct. at p. 2317].) The court concluded that a " 'rough proportionality'" standard "best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." (*Id.* at p. 391 [114 S. Ct. at pp. 2319-2320].)

The *Dolan* court also briefly addressed the scope of applicability of the heightened scrutiny and shifted burden of persuasion outlined in that decision and in *Nollan*: "Justice

Stevens' dissent takes us to task for placing the burden on the city to justify the required dedication. He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. [Citation.] Here, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city." (*Dolan, supra*, 512 U.S. at p. 391, fn. 8 [114 S. Ct. at p. 2320].) Most land use regulations "involve[] essentially legislative determinations classifying . . . areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel." (*Id.* at p. 385 [114 S. Ct. at p. 2316].)

In *Ehrlich*, this court addressed the question of whether the heightened scrutiny outlined in *Nollan* and *Dolan* applied to a *monetary* exaction. The defendant city in *Ehrlich* had conditioned permits for the development of a condominium complex on the site of a former private tennis club on the owner's payment of a $280,000 fee to be used for city recreational facilities. Though the members of this court disagreed on various parts of the analysis, we unanimously held that this ad hoc monetary exaction *was* subject to *Nollan/Dolan* scrutiny. (*Ehrlich*, *supra*, 12 Cal. 4th at pp. 874-881 (plur. opn. of Arabian, J.); *id.* at pp. 899-901 (conc. opn. of Mosk, J.); *id.* at p. 907 (conc. & dis. opn. of Kennard, J.); *id.* at p. 912 (conc. & dis. opn. of Werdegar, J.).) In such cases, the exaction must be more than "theoretically" or "plausibly" related to the ends that would be served by permit denial; *Nollan* and *Dolan* require "a *factually* sustainable proportionality between the effects of a proposed land use and a given exaction." (*Ehrlich*, *supra*, at p. 880 (plur. opn. of Arabian, J.).)

In holding the fee at issue subject to *Nollan/Dolan*, we emphasized that because the city had exercised its discretionary powers in imposing and calculating the recreational impact fee, rather than doing so pursuant to a legislative mandate or formula, imposition of the fee bore much the same potential for illegitimate leveraging of private property as did the real property exactions in *Nollan* and *Dolan*. Thus, the plurality concluded that heightened scrutiny was appropriate "[w]hen such exactions are imposed--as in this case--neither generally nor ministerially, but on an individual and discretionary basis." (*Ehrlich*, *supra*, 12 Cal. 4th at p. 876, 50 Cal. Rptr. 2d 242, 911 P.2d 429 (plur. opn. of Arabian, J.).) The plurality further distinguished "*generally* applicable development fee[s] or assessment[s]," as to which "the courts have deferred to legislative and political processes," from "special, discretionary permit conditions" like the one at issue in *Ehrlich*. (*Id.* at p. 881.) Justice Mosk, concurring, explained that although "general governmental fees" are "judged under a standard of scrutiny closer to the rational basis review of the equal protection clause than the heightened scrutiny of *Nollan* and *Dolan*" (*id.* at p. 897 (conc. opn. of Mosk, J.)), "when a municipality singles out a property developer for a development fee not imposed on others, a somewhat heightened scrutiny of that fee is required to ensure that the developer is not being subject to arbitrary treatment for extortionate motives" (*id.* at p. 900). Finally, Justice Kennard agreed that "[b]ecause the $280,000 recreational mitigation fee was imposed on Ehrlich's development application individually, and not pursuant to an ordinance or rule of general applicability, the constitutionality of this fee is evaluated using the *Nollan-Dolan* 'essential nexus' and 'rough proportionality' analysis." (*Id.* at p. 907 (conc. & dis. opn. of Kennard, J.).)

A majority in *Ehrlich* further agreed that to the extent a development mitigation fee is *not* subject to heightened scrutiny under *Nollan* and *Dolan*, there must nonetheless be a "reasonable relationship" between the fee and the deleterious impacts for mitigation of which the fee is collected. (*Ehrlich*, *supra*, 12 Cal. 4th at pp. 865, 867 (plur. opn. of Arabian, J.); *id.* at p. 897 (conc. opn. of Mosk, J.).)

In *Santa Monica Beach*, *supra*, 19 Cal. 4th 952, considering a challenge to a municipal rent control ordinance, we reviewed and synthesized the prior decisions as follows. "From the above, it can be inferred that the 'substantially advance' standard in the takings context is applied differently depending on the type of government action under consideration. As *Nollan* and *Dolan* both attest, government requirements that property owners dedicate land as a condition of receiving a development permit will receive the highest scrutiny—a type of intermediate scrutiny in which a government's dedication requirements will pass constitutional muster as long as the government 'make[s] some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.' (*Dolan*, *supra*, 512 U.S. at p. 391 [114 S. Ct. at pp. 2319-2320], fn. omitted.) . . . The most deferential review of land use decisions appears to be for those that pertain to 'essentially legislative determinations' that do not require any physical conveyance of property." (*Santa Monica Beach*, *supra*, 19 Cal. 4th at p. 966, quoting *Dolan*, *supra*, 512 U.S. at p. 385 [114 S. Ct. at p. 2316].)

"We recognized these different levels of takings scrutiny in [*Ehrlich*, *supra*, 12 Cal. 4th 854]. We rejected the claim that the *Nollan* and *Dolan* standards do not apply to development fees imposed on an individualized basis as a condition for development. . . . But a different standard of

scrutiny would apply to development fees that are generally applicable through legislative action 'because the heightened risk of the "extortionate" use of the police power to exact unconstitutional conditions is not present.' (*Id.* at p. 876; *see* also *id.* at p. 897 (conc. opn. of Mosk, J.); *id.* at p. 903 (conc. and dis. opn. of Kennard, J.).) Thus, individualized development fees warrant a type of review akin to the conditional conveyances at issue in *Nollan* and *Dolan*," while generally applicable development fees warrant a more deferential type of review. (*Santa Monica Beach*, *supra*, 19 Cal. 4th at pp. 966-967.)

The Court of Appeal held that housing replacement fees assessed under the HCO were subject to *Nollan/Dolan/Ehrlich* review because they were exacted discretionarily and applied only to a relatively small number of property owners rather than to "every other property in the City." Plaintiffs defend that analysis, while the City argues for the more deferential constitutional scrutiny applicable to land use regulations made generally applicable by legislative enactment to a class of property owners.

We agree with the City. Contrary to the Court of Appeal's assertion, and unlike *Ehrlich*, the HCO does not provide City staff or administrative bodies with any discretion as to the imposition or size of a housing replacement fee. Under the HCO, the responsible city agency, the Department (formerly the Bureau) of Building Inspection, "shall . . . deny" an application to convert residential units to tourist use if the housing replacement requirement is not satisfied and "shall issue" the permit if the ordinance's requirements, including that for housing replacement, are met. (HCO, §§ 41.14, 41.15.) The *applicant* chooses how to satisfy the replacement requirement, whether by constructing or bringing onto the market new units; by sponsoring such construction by a public

or nonprofit private housing developer; or by paying, in lieu of such construction, a fee to a designated City housing fund. (*Id.*, § 41.13.) If the applicant chooses the in lieu fee, its amount is determined according to a set formula based on replacement cost, which in turn is determined by a different City agency, the City's Department of Real Estate, through two independent appraisals. (*Ibid.*) Thus, no meaningful government discretion enters into either the imposition or the calculation of the in lieu fee.[11]

Nor did the City single out plaintiffs for payment of a housing replacement fee. The HCO is generally applicable legislation in that it applies, without discretion or discrimination, to every residential hotel in the city. All proposals to convert residential to tourist use are subject to the same ordinance. In suggesting that an ordinance, to be considered generally applicable, must apply to "every other property in the City," the Court of Appeal invoked an impossible standard, one that would be met by almost no rationally drawn land use regulation. The HCO applies to all property in the class logically subject to its strictures, that is, to all residential hotel units; no more can rationally be demanded of local land use legislation in order to qualify for deferential review. (We do not speak of a legislative "class"

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[11] That the planning commission allegedly required compliance with the HCO as a condition of the conditional use permit does not alter our conclusion as to City discretion. While issuance of a conditional use permit is generally discretionary (*see* S.F. Planning Code, §§ 303, 316, 316.8), conversion of residential rooms to commercial use is unconditionally *prohibited* above the first floor in the North Beach district *except* insofar as permitted by the HCO (S.F. Planning Code, §§ 722.38, 790.84). The planning commission, therefore, had no discretion to permit such change in use absent HCO compliance.

artificially tailored to encompass only a single property; no such claim has been or could be made as to the HCO.)[12]

In these respects a housing replacement fee assessed under the HCO stands in sharp contrast to the recreational facilities replacement fee we found subject to heightened scrutiny in *Ehrlich*. In that case, the city relied on no specific legislative mandate to impose the fee condition and no legislatively set formula to calculate its size. The condition was imposed ad hoc, entirely at the discretion of the city council and staff. (*Ehrlich*, *supra*, 12 Cal. 4th at p. 862.) So far as the court's opinions reveal, the plaintiff's property development proposal was the *only* one upon which such a fee condition had been imposed. We concluded that applying *Nollan/Dolan* review to such a "special, discretionary permit condition[]" (*Ehrlich*, *supra*, at p. 881 (plur. opn. of Arabian, J.)) was necessary "to ensure that the developer is not being subject to arbitrary treatment for extortionate motives" (*id.* at p. 900 (conc. opn.

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[12] According to the City, the ordinance applies to more than 500 properties containing (as stated in the 1990 HCO) more than 18,000 guest rooms. (HCO, § 41.3, subd. (d).) Plaintiffs accept these numbers but nonetheless characterize the City as imposing housing preservation costs on only "a few" property owners. The Court of Appeal, similarly, alluded to "a small group" of property owners as bearing the HCO's costs. Whether or not 500 or more property owners are properly deemed "a few" or a "small group," however, the critical fact remains that the HCO is generally and nondiscriminatorily applicable within a class of properties reasonably defined according to the purpose of the ordinance. (*See Penn Central Transp. Co. v. New York City*, *supra*, 438 U.S. at p. 132 [98 S. Ct. at p. 2663] [owners of landmarked properties not arbitrarily singled out to bear costs; law was a comprehensive plan to preserve historic structures, applying to over 400 landmarks and 31 historic districts throughout the city].)

of Mosk, J.)). At the same time, we distinguished cases such as the present one, involving a "*generally* applicable development fee or assessment" (*id.* at p. 881 (plur. opn. of Arabian, J.)) imposed not "individually" but "pursuant to an ordinance or rule of general applicability" (*id.* at p. 907 (conc. & dis. opn. of Kennard, J.)).

(6) The "sine qua non" for application of *Nollan/Dolan* scrutiny is thus the "discretionary deployment of the police power" in "the imposition of land-use conditions in individual cases." (*Ehrlich*, *supra*, 12 Cal. 4th at p. 869 (plur. opn. of Arabian, J.).) Only "individualized development fees warrant a type of review akin to the conditional conveyances at issue in *Nollan* and *Dolan*." (*Santa Monica Beach*, *supra*, 19 Cal. 4th at pp. 966-967; *see also Landgate, Inc. v. California Coastal Com.* (1998) 17 Cal. 4th 1006, 1022 [73 Cal. Rptr. 2d 841, 953 P.2d 1188] (*Landgate*) [heightened scrutiny applies to "development fees imposed on a property owner on an individual and discretionary basis"].)

(3c) Under our precedents, therefore, housing replacement fees assessed under the HCO are not subject to *Nollan/Dolan/Ehrlich* scrutiny.

Plaintiffs argue that a legislative scheme of monetary exactions (i.e., a schedule of development mitigation fees) nevertheless should be subject to the same heightened scrutiny as the ad hoc fees we considered in *Ehrlich*, because of the danger a local legislative body will use such purported mitigation fees--unrelated to the impacts of development--simply to fill its coffers. Thus, plaintiffs hypothesize that absent careful constitutional scrutiny a city could "put zoning up for sale" by, for example, "prohibit[ing] all development except for one-story single-family homes, but offer[ing] a second story permit for $20,000, an apartment building

permit for $10,000 per unit, a commercial building permit for $50,000 per floor, and so forth."[13]

We decline plaintiffs' invitation to extend heightened takings scrutiny to all development fees, adhering instead to the distinction we drew in *Ehrlich*, *supra*, 12 Cal. 4th 854, *Landgate*, *supra*, 17 Cal. 4th 1006, and Santa Monica *Beach*, *supra*, 19 Cal. 4th 952, between ad hoc exactions and legislatively mandated, formulaic mitigation fees. While legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process. A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election. Ad hoc individual monetary exactions deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls.

Nor are plaintiffs correct that, without *Nollan/Dolan/Ehrlich* scrutiny, legislatively imposed development mitigation fees are subject to no meaningful means-ends review. As a matter of both statutory and constitutional law, such fees must bear a reasonable

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[13] Alternatively, plaintiffs suggest that "[i]f this Court believes that some degree of scrutiny less than *Nollan* and *Dolan* is appropriate for legislative exactions," we could articulate a lesser standard by shifting the burden of proof to the property owner while maintaining the substantive *Nollan/Dolan* test. This case having been decided on demurrer, the burden of proof is not at issue; we assume the facts as pled in the second amended complaint. We therefore decline to address burden of proof issues here.

relationship, in both intended use and amount, to the deleterious public impact of the development. (Gov. Code, § 66001; *Ehrlich*, *supra*, 12 Cal. 4th at pp. 865, 867 (plur. opn. of Arabian, J.); *id.* at p. 897 (conc. opn. of Mosk, J.); *Associated Home Builders etc., Inc. v. City of Walnut Creek* (1971) 4 Cal. 3d 633, 640 [94 Cal. Rptr. 630, 484 P.2d 606, 43 A.L.R.3d 847].) Plaintiffs' hypothetical city could only "put [its] zoning up for sale" in the manner imagined if the "prices" charged, and the intended use of the proceeds, bore a reasonable relationship to the impacts of the various development intensity levels on public resources and interests. While the relationship between means and ends need not be so close or so thoroughly established for legislatively imposed fees as for ad hoc fees subject to *Ehrlich*, the arbitrary and extortionate use of purported mitigation fees, even where legislatively mandated, will not pass constitutional muster.

(7) Finally, we should not lose sight of the constitutional background. "To put the matter simply, the taking of money is different, under the Fifth Amendment, from the taking of real or personal property. The imposition of various monetary exactions--taxes, special assessments, and user fees--has been accorded substantial judicial deference." (*Ehrlich*, *supra*, 12 Cal. 4th at p. 892 (conc. opn. of Mosk, J.).) "There is no question that the takings clause is specially protective of property against *physical occupation* or invasion . . . . It is also true . . . that government generally has greater leeway with respect to noninvasive forms of land-use regulation, where the courts have for the most part given greater deference to its power to impose broadly applicable fees, whether in the form of taxes, assessments, user or development fees." (*Id.* at pp. 875-876 (plur. opn. of Arabian, J.).)

(3d) *Nollan* and *Dolan* involved the government's exaction of an interest in specific real property, not simply the payment of a sum of money from any source available; they have generally been limited to that context. (*See*, *e.g.*, *Monterey v. Del Monte Dunes at Monterey, Ltd.* (1999) 526 U.S. 687, 703 [119 S. Ct. 1624, 1635, 143 L. Ed. 2d 882] [*Dolan* "inapposite" to permit denial]; *Clajon Production Corp. v. Petera* (10th Cir. 1995) 70 F.3d 1566, 1578 [heightened scrutiny limited to exaction of real property]; *Commercial Builders v. Sacramento* (9th Cir. 1991) 941 F.2d 872, 875 [*Nollan* inapplicable to housing mitigation fee]; *cf. United States v. Sperry Corp.* (1989) 493 U.S. 52, 62, fn. 9 [110 S. Ct. 387, 395, 107 L. Ed. 2d 290] ["It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible"].) In *Ehrlich*, we extended *Nollan* and *Dolan* slightly, recognizing an exception to the general rule of deference on distribution of monetary burdens, because the ad hoc, discretionary fee imposed in that case bore special potential for government abuse. We continue to believe heightened scrutiny should be limited to such fees. (Accord, *Krupp v. Breckenridge Sanitation Dist.* (Colo. 2001) 19 P.3d 687, 698 [to the extent *Nollan/Dolan* review applies to purely monetary fees, it is limited to "exactions stemming from adjudications particular to the landowner and parcel"].) Extending *Nollan* and *Dolan* generally to all government fees affecting property value or development would open to searching judicial scrutiny the wisdom of myriad government economic regulations, a task the courts have been loath to undertake pursuant to either the takings or due process clause. (*See*, *e.g.*, *Dolan*, *supra*, 512 U.S. at p. 384 [114 S. Ct. at p. 2316] [reiterating "the authority of state and local governments to engage in land use planning" even when such regulation diminishes individual property values]; *Penn Central Transp. Co. v. New York City*, *supra*, 438 U.S. at p.

133 [98 S. Ct. at p. 2664] [that landmarks law burdens have more severe impact on some landowners than others does not render its application a taking: "Legislation designed to promote the general welfare commonly burdens some more than others"]; *Usery v. Turner Elkhorn Mining Co.* (1976) 428 U.S. 1, 19 [96 S. Ct. 2882, 2894, 49 L. Ed. 2d 752] [wisdom of particular cost-spreading scheme "not a question of constitutional dimension"].)

C. *Merits of Plaintiffs' Takings Claims*

(8a) Plaintiffs attack the housing replacement provisions of the HCO both on their face and as applied to the San Remo Hotel. In the discussion that follows, we address only the substantive contentions made in this court by the plaintiffs.[14]

Challenging the ordinance on its face, plaintiffs assert there is no connection between the housing replacement fees assessed and the housing lost by conversion to tourist use. We conclude, to the contrary, that the housing replacement fees bear a reasonable relationship to loss of housing. Under the ordinance, the amount of the in lieu fee is based on the number of rooms being converted from residential to tourist designation; the number of rooms designated residential is, in turn, based on the self-reported use as of September 23, 1979,

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[14] The concurring and dissenting opinion, in criticizing us first for addressing these issues at all (conc. & dis. opn., *post*, at pp. 687-688) and then for failing to address issues that have *not* been raised in this court (*id.* at pp. 690-691), seemingly ignores the choices plaintiffs have made in refining their claims as they climbed the appellate ladder. In particular, had plaintiffs wished to resurrect theories asserted in their pleading, but not raised in the City's petition for review, they could have done so by answer to the petition. (*See* Cal. Rules of Court, rule 28(e)(5).)

shortly before a City moratorium on residential hotel conversion first came into force. (HCO, § 41.3, subd. (g).) On its face, the use of a defined historical measurement point is reasonably related to the HCO's housing preservation goals (*see* HCO, §§ 41.2, 41.3), and the use of individualized self-reported survey results, with inspection by City staff if needed, and opportunities for appeal by the hotel owner or challenge by other interested parties (HCO, § 41.6), is a facially reasonable means of determining initial status. Plaintiffs fail to demonstrate from the face of the ordinance that fees assessed under the HCO bear no reasonable relationship to housing loss in the *generality* or *great majority* of cases, the minimum showing we have required for a facial challenge to the constitutionality of a statute. (*See Kasler v. Lockyer* (2000) 23 Cal. 4th 472, 502 [97 Cal. Rptr. 2d 334, 2 P.3d 581]; *California Teachers Assn. v. State of California* (1999) 20 Cal. 4th 327, 345, 347 [84 Cal. Rptr. 2d 425, 975 P.2d 622]; *id.* at pp. 358-359 (dis. opn. of Werdegar, J.).)[15]

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[15] In support of their claim of a lack of "nexus" between the City's housing goals and the in lieu fees assessed under the HCO, plaintiffs rely on *Seawall Associates v. City of New York* (1989) 74 N.Y.2d 92 [544 N.Y.S.2d 542, 542 N.E.2d 1059], in which an ordinance similar in some ways to the HCO (but differing in some respects as well) was found to work a facial taking of hotel owners' property. But in finding that the ordinance did not substantially advance the city's goal of alleviating homelessness, the New York court explicitly exercised the heightened scrutiny described in *Nollan*, which, of course, we have concluded does not apply to the HCO's in lieu fees. (*Seawall*, *supra*, at pp. 1068-1069.) The *Seawall* court, moreover, applied *Nollan* to burdensome land use restrictions generally, not only to exactions imposed as conditions of permit approvals. (*See Seawall*, *supra*, at p. 1068 [discussing the ordinance's "ban on converting, destroying and warehousing [single-room occupancy] units"].) To that extent, *Seawall* was impliedly overruled by *Monterey v. Del Monte Dunes at Monterey*,

Plaintiffs also assert the City has admitted, in the HCO itself, that the in lieu fees assessed are intended to raise money rather than mitigate the loss of housing. They cite to HCO section 41.3, subdivision (m), a legislative finding in the 1990 ordinance explaining why the in lieu fees were raised from 40 percent of replacement cost to 80 percent. That finding states that the 40 percent figure was found inadequate because of lower than expected contributions by government sources. "Federal, state and local funds were incorrectly assumed at that time to be available and sufficient to make up the shortfall between the 40 percent in lieu fee and actual replacement costs. For example, in 1979 the federal government was spending 32 billion dollars on housing and is spending only 7 billion dollars in 1989." (HCO, § 41.3, subd. (m).) Contrary to plaintiffs' suggestion, this finding does not tend to show an impermissible revenue-raising purpose for the in lieu fees, but only the legitimate purpose of more fully funding the replacement of housing lost through conversion.

We note, as well, that the structure of the HCO's housing replacement provisions rebuts plaintiffs' claim that they are intended merely to raise general revenue. No hotel owner is required to pay a fee to the City as a condition of conversion. Rather, to comply with the replacement provisions and receive a conversion permit, an owner may construct comparable housing units for rent; bring units onto the market from any building not subject to the HCO; construct or

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Ltd., *supra*, 526 U.S. at pages 702-703 [119 S. Ct. at pages 1634-1635], in which the high court held heightened scrutiny was "inapposite" to permit denials and other land use restrictions not involving exactions. The New York Court of Appeals acknowledged the overruling in *Bonnie Briar Syndicate v. Mamaroneck* (1999) 94 N.Y.2d 96 [699 N.Y.S.2d 721, 721 N.E.2d 971, 975].)

rehabilitate, even at less than a one-to-one ratio, apartment units for elderly, disabled or low-income renters, or transitional or emergency housing; or contribute to a private nonprofit housing developer for construction of comparable units. (HCO, § 41.13, subd. (a)(1)-(3), (5).) Even when the hotel owner chooses to pay a fee in lieu of such replacement, the fee is not paid to the City's general fund but to a separate residential hotel preservation account. (HCO, § 41.13, subd. (a)(4).) The HCO was clearly not designed as a means of raising general revenue.

In their last facial claim, plaintiffs assert that the HCO does not preserve available housing because "[t]iny hotel rooms without baths and without kitchens are not housing." We disagree. While a single room without a private bath and kitchen may not be an ideal form of housing, such units accommodate many whose only other options might be sleeping in public spaces or in a City shelter. Plaintiffs do not dispute that San Francisco has long suffered from a shortage of affordable housing or that residential hotel units serve many who cannot afford security and rent deposits for an apartment. (*See* HCO, § 41.3, subds. (a)-(f).) Maintaining the availability of residential hotel rooms is a reasonable means of serving one segment of San Franciscans' housing needs.[16]

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[16] We note as well that plaintiffs' challenge in this respect goes not to the housing replacement fee, or to any other exaction made as a condition of permit approval, but to the City's underlying reasons for restricting residential hotel conversion. A challenger to the justification for such a legislatively imposed, generally applicable restriction on changes in real property use "bears the burden of proving that the regulation 'constitutes an arbitrary regulation of property rights.'" (*Santa Monica Beach*, *supra*, 19 Cal. 4th at p. 966, quoting *Dolan*, *supra*, 512 U.S. at p. 391, fn. 8 [114 S. Ct. at p. 2320].) Other than to assert that single-room

Our dissenting colleague argues that the HCO constitutes a facial taking because, in the well-known phrase of Justice Holmes, it affords insufficient "'reciprocity of advantage'" to owners of the hotels affected. (Dis. opn., *post*, at pp. 701, 702, quoting *Penna. Coal Co. v. Mahon* (1922) 260 U.S. 393, 415 [43 S. Ct. 158, 160, 67 L. Ed. 322, 28 A.L.R. 1321] (*Penna. Coal Co.*).) The dissent would apparently approve an economic regulation affecting property only if each property owner restricted by the regulation were guaranteed, at the same time, a proportionate benefit from the same regulation. Whether Holmes's conception of the justifiable regulation of property was as narrow as the dissent's is unclear, but, in any case, such a restrictive view has generally not controlled the development of takings law.

In *Penna. Coal Co.* itself, Justice Brandeis observed that in many cases where the high court had approved the exercise of police powers to regulate the use of property, the burdened property owner had received no reciprocal benefit from the regulation "unless it be the advantage of living and doing business in a civilized community." (*Penna. Coal Co.*, *supra*, 260 U.S. at p. 422 [43 S. Ct. at p. 163] (dis. opn. of Brandeis, J.).) In the many difficult cases that have followed, it has generally been the Brandeis view that has prevailed: "Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. [Footnote 21:] *The Takings Clause has never been read to require the States or the courts to calculate whether a specific*

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rentals cannot be considered housing, a view we reject, plaintiffs make no attempt at such a showing.

individual has suffered burdens under this generic rule in excess of the benefits received. Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of benefits received." (*Keystone Bituminous Coal Assn. v. DeBenedictis*, *supra*, 480 U.S. at p. 491 & fn. 21 [107 S. Ct. at p. 1245], italics added; *see also Penn Central Transp. Co. v. New York City*, *supra*, 438 U.S. at p. 133 [98 S. Ct. at p. 2664] (*Penn Central*) ["that the Landmarks Law has a more severe impact on some landowners than on others . . . does not mean that the law effects a 'taking'"]; *Agins v. Tiburon* (1980) 447 U.S. 255, 262 [100 S. Ct. 2138, 2142, 65 L. Ed. 2d 106] [restrictive zoning ordinances "benefit the [property owners] as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas"].) Thus, the necessary reciprocity of advantage lies not in a precise balance of burdens and benefits accruing to property from a single law, or in an exact equality of burdens among all property owners, but in the interlocking system of benefits, economic and noneconomic, that all the participants in a democratic society may expect to receive, each also being called upon from time to time to sacrifice some advantage, economic or noneconomic, for the common good.

(9) The federal and state takings clauses, to be sure, place a limit, imprecise as it may be, on the regulatory burdens an individual property owner may be made to bear for public purposes. The breadth or narrowness of the class burdened by the regulation, the extent to which a regulation defeats the owner's reasonable investment-backed expectations, and the extent to which the affected property is also benefitted by the regulation are certainly pertinent to whether a regulation works a taking. (*Agins v. Tiburon*, *supra*, 447 U.S. at p. 262

[100 S. Ct. at p. 2142]; *Penn Central*, *supra*, 438 U.S. at pp. 124, 132 [98 S. Ct. at pp. 2659, 2663].) **(8b)** But the HCO neither targets an arbitrary small group of property owners, nor deprives all the burdened properties of so much of their value, without any corresponding benefit, as to constitute a taking on its face. As discussed earlier, the HCO affects *all* the approximately 500 residential hotels in San Francisco, comparable to the "over 400" New York City landmarks the United States Supreme Court relied upon in holding that landmark laws could not be characterized as "discriminatory, or 'reverse spot,' zoning." (*Penn Central*, *supra*, at p. 132 [98 S. Ct. at p. 2663].) Also like the landmarks law upheld in *Penn Central*, the HCO allows the property owner to continue the property's preordinance use unhindered; like the landmarks law, therefore, the HCO "does not interfere with what must be regarded as [the property owner's] primary expectation concerning the use of the parcel." (*Id.* at p. 136 [98 S. Ct. at p. 2665].) Finally, the chief purpose of the HCO, ensuring affordable and available housing for those San Franciscans who would otherwise be without it, carries benefits for all the City's property owners, including those operating tourist hotels. (*See id.* at pp. 134-135 [98 S. Ct. at pp. 2664-2665] [landmarks law benefits all New Yorkers].) We cannot agree with the dissent that a law applying on equal terms to all properties in a sizeable class defined by use, designed to benefit the City as a whole, and merely prohibiting a change of use from residential to commercial unless the owner mitigates the detrimental impact of that change, constitutes a facial taking of property.

The above may help to explain why the dissent's hypothetical concerning governmental appropriation of an automobile is inapposite. A law arbitrarily selecting a private automobile owner to dedicate his or her car to public use or pay for the government to buy another one would, as the

dissent suggests (dis. opn., *post*, at p. 693) clearly require compensation. Less clear, but more like the present case, would be a law requiring all common carriers to take certain mitigation measures before converting from passenger to freight service. A burden placed broadly and nondiscriminatorily on changes in property's use is not the equivalent of an arbitrary decision to hold an individual's property for ransom. As elsewhere in takings law, the answers are found not in absolute rules for all cases, but by the particularized weighing of public and private interests. (*Agins v. Tiburon*, *supra*, 447 U.S. at pp. 260-261 [100 S. Ct. at pp. 2141-2142].)

Finally, the dissent insists that owners of residential hotels cannot be required to continue the use of their property as low-income housing, or to mitigate the impact of ending that use, because they "did not cause poverty in San Francisco." (Dis. opn., *post*, at pp. 692-693.) But, of course, the owners of undeveloped property in *Agins v. Tiburon*, *supra*, 447 U.S. 255, restricted by zoning in how intensely they could develop the property, had not (yet) caused "the ill effects of urbanization" (*id.* at p. 261 [100 S. Ct. at p. 2142]) the zoning law was designed to protect against, and the owners of New York City's Grand Central Terminal had not (yet) caused the loss of historic structures that motivated that city's landmarks law (*Penn Central*, *supra*, 438 U.S. at p. 107 [98 S. Ct. at pp. 2650-2651]). Here, as in those cases, it is the detrimental effects of a *change* in the use of property that motivates the regulation. A use not in itself noxious or harmful, such as the operation of a tourist hotel, may nonetheless call for mitigation when the change of property to that use results in the loss of an existing use of public importance. (*See id.* at p. 134, fn. 30 [98 S. Ct. at p. 2664] ["Nor . . . can it be asserted that the destruction or fundamental alteration of a historic landmark is not

harmful"].)

If, as Justice Holmes warned, the Constitution "does not enact Mr. Herbert Spencer's Social Statics" (*Lochner v. New York* (1905) 198 U.S. 45, 75 [25 S. Ct. 539, 546, 49 L. Ed. 937] (dis. opn. of Holmes, J.)), it just as surely does not enact the late Robert Nozick's "Minimal State." (See Nozick, Anarchy, State and Utopia (1974) pp. ix, 171-172, 272-274.) However strongly and sincerely the dissenting justice may believe that government should regulate property only through rules that the affected owners would agree indirectly enhance the value of their properties (dis. opn., *post*, at pp. 700-701), nothing in the law of takings would justify an appointed judiciary in imposing that, or any other, personal theory of political economy on the people of a democratic state.

(10) Turning to the as-applied challenge, plaintiffs argue "[t]he $567,000 fee imposed by the Hotel Ordinance has no connection at all to the Field Brothers' tourist use of the San Remo Hotel" because (quoting the Court of Appeal) the permit simply "'allow[ed] an existing use to continue.'" As explained above, however, the mitigation fee was based on the number of units designated residential that were proposed for conversion, and the residential designation of the San Remo Hotel's rooms was reasonably based on the hotel management's own report of the rooms' use on the HCO's initial status date of September 23, 1979.[17] Plaintiffs'

[17] Plaintiffs assert they were unaware of the 1981 survey that established the hotel's initial status, and did not know of the hotel's classification until 1983. No facts alleged in their complaint, however, would show that they were prevented by City action from learning of and participating in the survey and certification process. Under the HCO, the City-issued certificate of use, from which plaintiffs could have appealed, was required to be posted in the

operative complaint, moreover, contains no allegations specifically relating to the San Remo Hotel's use as of the initial status date. The only use allegation covering that date is a general assertion that the hotel has been "primarily" used by "transient and tourist" guests since 1916. Nowhere do plaintiffs allege that the San Remo Hotel was, in 1979 or at any time, *entirely* in tourist use, as would be required to support their claim that the housing replacement fee has "no connection at all" to the hotel's historical use. (As discussed earlier, the administrative record indicates that plaintiffs could not truthfully so allege, since it shows mixed tourist and residential use throughout the 1980's.) The complaint, therefore, fails to state a cause of action on the ground that the amount of the fee paid by plaintiffs bore no reasonable relationship to the impacts of their proposed conversion to tourist use.

Plaintiffs further argue that, because the conditional use permit granted them by the City Planning Commission contained a condition requiring them to offer lifetime leases to existing residential tenants, no housing was lost by conversion to tourist use. Plaintiffs' conclusion, however, does not follow from their premise. The HCO seeks to preserve the *supply* of affordable housing units, not merely to extend the tenancy of any individual resident. (HCO, § 41.2.) Rooms designated residential under the ordinance that were vacant or temporarily rented to tourists at the time of

hotel lobby when issued in 1981. (HCO, § 41.6(d).) Even when they took possession in 1983, moreover, plaintiffs made no effort to correct the allegedly incorrect designation, waiting until 1987 even to draw it to the City's attention by letter. In any event, plaintiffs do not contend the HCO's survey and classification procedures deprived them of procedural due process, and we express no opinion in that regard.

conversion were nonetheless housing units that would be lost in the conversion, since after conversion they would no longer be held available, by law, for residential tenants. The same is true of rooms occupied by residential tenants who declined the offered leases. Even as to any rooms for which lifetime leases were accepted, the residential designation to be lost by conversion would have preserved the residential availability of those units after the lessees moved or passed away. Accordingly, even if no current resident were required to move, the City could reasonably base the in lieu fee on the number of units designated and reserved for residential use that would be made unavailable by the plaintiffs' proposed conversion of all of the hotel's rooms to tourist use.

Finally, plaintiffs, citing *Ehrlich*, *supra*, 12 Cal. 4th at page 883, contend that the size of a development mitigation fee may not constitutionally be based on the loss of the property's prior use. In *Ehrlich*, of course, the court examined the recreational facilities fee under the "rough proportionality" standard (*id.* at p. 882), a type of scrutiny inapplicable here. Perhaps more significantly, the fee in *Ehrlich* was imposed as a condition of a requested change in zoning for the subject property; there was no existing recreational use, the club having already been closed as uneconomical and its facilities demolished. (*Id.* at pp. 861-862.) The particular recreational facilities previously existing on the property having been permissibly demolished, the city could not use the value of their loss to impose a mitigation fee for the *change in zoning* sought by the property owner, although the majority held the fee *could* be based on the costs of planning and rezoning other properties for the needed recreational use. (*Id.* at pp. 883-884 (plur. opn. of Arabian, J.); *id.* at p. 902 (conc. opn. of Mosk, J.).) In the present case, the housing that was to be lost by conversion of rooms from residential to tourist use had *not* been abandoned or

demolished; nor had plaintiffs invoked their statutory right (Gov. Code, § 7060) to withdraw residential accommodations from the market. Plaintiffs sought not merely a change in the zoning affecting the site of the San Remo Hotel, but permission to change the use of existing residential facilities on the property. A mitigation fee measured by the resulting loss of housing units was thus reasonably related to the impacts of plaintiffs' proposed change in use.

DISPOSITION

The judgment of the Court of Appeal is reversed insofar as it reversed the superior court's judgment for defendant on plaintiffs' complaint. In all other respects the judgment of the Court of Appeal is affirmed.

DISSENT

BAXTER, J., Concurring and Dissenting.

I concur in the majority opinion insofar as it finds the Court of Appeal erred in assessing plaintiffs' as-applied challenge to the City and County of San Francisco's (City) housing replacement fee under a standard of heightened scrutiny. I also agree with much of what the majority says about the test that does apply to this exaction. My objections are that in the remainder of its analysis, the majority fails to decide the issues on which we granted review and strains to reach questions that are not fairly included in the review petition.

I ask different questions and, not surprisingly, come up with different answers. Unlike the majority, I would affirm the Court of Appeal to the extent that it remanded for further proceedings concerning the petition for writ of administrative

mandate and would remand for further proceedings under the correct takings standard.

I

The majority frames the first question as whether the City properly required plaintiffs to obtain a conditional use permit for full tourist use of the hotel. The problem with this formulation is that it treats the issue of the conditional use permit as an all-or-none proposition. This is a mistake. The critical issue is not *whether* plaintiffs needed to obtain a conditional use permit if they wished to rent all of the hotel's rooms to tourists--as the majority notes, there is evidence in the record to support the finding that *some* rooms had historically been rented to long-term residents (maj. opn., *ante*, at pp. 659, 663)--but *how many* rooms required a permit before plaintiffs could rent them to tourists. To answer *that* question, it is necessary first to determine how many tourist rooms are grandfathered as a permitted conditional use.

As the City points out, the process of converting residential hotel rooms to tourist hotel rooms requires two separate permits: a conversion permit from the City Department of Building Inspection under the Residential Hotel Unit Conversion and Demolition Ordinance (HCO), and a conditional use permit from the City Planning Commission under the City Planning Code. Plaintiffs do not independently challenge here the requirement of obtaining a conversion permit from the Department of Building Inspection, merely the need to obtain a conditional use permit from the Planning Commission.

The parties agree that no duty exists to obtain a conditional use permit to continue a property use that qualifies

as a permitted conditional use.[1] A permitted conditional use is one that "existed lawfully at the time a new zoning prohibition or restriction came into force" and "is conditionally *permitted* by the new zoning law." (Maj. opn., *ante*, at p. 661, fn. 10.) Thus, a permitted conditional use in the North Beach neighborhood commercial district must have "lawfully existed" on the effective date of the 1987 ordinance. (*Id.* at pp. 658-659, citing S.F. Planning Code, § 179, subd. (a)(2).) It was on this ground that plaintiffs disputed the need for a conditional use permit. (See maj. opn., *ante*, at p. 653.)[2]

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[1] It follows that no conversion permit would be needed to continue a permitted conditional use, either. Yet, under the result endorsed by the majority, property owners who wish to convert only one residential room to tourist use must also convert all remaining rooms in the building—even rooms grandfathered as a permitted conditional tourist use—and satisfy the one-for-one replacement requirement for *all* the rooms. Remarkably, the majority makes no effort to justify such a condition under the takings test the court has adopted.

[2] The majority purports to find it significant that the conditional use permit did not "specify the number of rooms subject to one-to-one replacement under the HCO, calculate the in lieu replacement fee to be assessed, or impose any other condition dependent on the number of rooms previously in tourist use." (Maj. opn., *ante*, at p. 662.) Plaintiffs' challenge, however, is not to the contents of the permit, but to the administrative decision that *preceded* issuance of the permit, in which the City refused to grandfather any prior tourist use of the hotel as a permitted conditional use. (*See id.* at p. 653.) Although plaintiffs thereafter applied for a conditional use permit for *all* their hotel rooms, they did so, as the City Planning Commission noted, "under protest" and without waiving their claim that the majority of the rooms should have been grandfathered as a permitted conditional tourist use.

The City asserts that *no* tourist rental could have "lawfully" existed in the district because of the legal restrictions on tourist rental imposed by the HCO, which was enacted in 1981 and amended in 1990. The City, however, has been unable to explain why the HCO, which is part of the San Francisco *Administrative* Code, should have been considered by the City Planning Commission in determining whether tourist rental "lawfully existed" under section 179, subdivision (a)(2) of the San Francisco *Planning* Code, where the zoning ordinances are found. Indeed, the City's statements throughout these proceedings preclude any attempt to cut and paste the HCO into the Planning Code.

As the City repeatedly asserts, the HCO is "separate" from the City Planning Code and, in particular, did not change the zoning classification of the San Remo Hotel under the City Planning Code. The City likewise concedes that "[n]either the Planning Commission nor the Zoning Administrator has responsibility for administering the HCO." The HCO is administered instead by the City Department of Building Inspection.

These concessions are consistent with an opinion letter by the city attorney issued contemporaneously with the enactment of the HCO in 1981. In that letter, the city attorney stated that

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Were plaintiffs on remand to establish the truth of their allegation that at least 53 of their 62 rooms should be grandfathered as a permitted conditional tourist use, it is certainly plausible that they would not undertake the permitting process for the remaining handful of rooms. Without a remand, however, the majority has approved a procedure in which plaintiffs, no matter the number of rooms sought to be converted, are obligated to pay $ 567,000. It is difficult to imagine how such a scheme satisfies even the most lax of constitutional tests.

the HCO was not a zoning law, that the City Planning Code "makes no distinction between the use of a hotel devoted to permanent residents or to tourists," that the adoption of the HCO "does not render an existing structure or use a non-conforming structure or use," and that whether a tourist use may continue as a permitted conditional use is governed by the applicable sections of the *Planning* Code. (S.F. City Atty., Opn. No. 81-54 (Sept. 14, 1981) pp. 7-8; see maj. opn., *ante*, at p. 660.)

The city attorney's opinion letter, together with the City's concessions, undercut the City's efforts here to claim that the HCO was a critical component of the determination whether tourist use *lawfully* existed as a permitted conditional use under the City Planning Code. Indeed, the zoning administrator was apparently so uncomfortable with the City's belated change of heart that he declined to accept the City's newly minted position and found instead that "[i]t has been the Department of City Planning's ('Department') *administrative practice* to classify residential hotels designated under the Hotel Ordinance as residential uses under the Planning Code." (Italics added.) But "administrative practice" is merely a convenience; it does not aid in determining whether a prior use was lawful or unlawful. The body of law relevant to that determination—i.e., the Planning Code—did not distinguish between tourist hotels and residential hotels and therefore did not prohibit tourist rentals at the San Remo.[3]

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[3] The majority's resolution of this hotly disputed issue is, to put it charitably, unclear. The majority begins by declining to wade into the fray, insisting that it is unnecessary to resolve whether the City Planning Commission properly considered the HCO to be a legal restriction on tourist use of the hotel since "the critical issue in this case is *not the lawfulness* of the historical tourist use, *but its extent*." (Maj. opn., *ante*, at p. 660.) Later on, however, the

The superior court, on this same record, impliedly rejected the zoning administrator's restrained construction and found instead that "[s]ince the issuance of the Certificate of Use in 1981, residential use of the San Remo Hotel was the only lawful use." The majority holds—and I agree—that the superior court erred. (Maj. opn., *ante*, at p. 660.) But the majority declines to issue the administrative writ on the separate ground that plaintiffs' proposal to rent all of the rooms to tourists is "a significant alteration or enlargement of the historical lawful use" and therefore required a new conditional use permit. (*Ibid.*) I agree that a conditional use permit is required to the extent plaintiffs wish to alter or enlarge the historical lawful use. I disagree strongly, however, with the majority's unstated and unproven assumption that this encompasses *all* of the San Remo's rooms. The majority has simply terminated its analysis prematurely.

Nothing in the record supports the majority's implied finding that none of the rooms could be grandfathered as a permitted conditional tourist use. Indeed, neither the zoning

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majority appears to leave the sidelines and adopt the City's newly minted position, rejecting plaintiffs' effort to have prior tourist use grandfathered as a permitted conditional use "because plaintiffs' tourist use of the hotel was, as required under the HCO, *temporary* and *subject to preemption by residential demand*." (Maj. opn., *ante*, at p. 662.) If the latter statement represents the majority's true views, the majority ought in all fairness explain why the city attorney, the zoning administrator, and the Court of Appeal (*see Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal. App. 3d 892, 902 [223 Cal. Rptr. 379] [HCO "does not regulate land use in the same manner as zoning laws"]) all are wrong about the role of the HCO in determining whether a permitted conditional use has been established.

administrator nor the superior court bothered to determine how many rooms might have been used historically as tourist rooms because of their erroneous belief that the HCO barred *any* tourist use from qualifying as a lawful permitted conditional use. (*See* maj. opn., *ante*, at p. 658.) Similarly, the Board of Permit Appeals, in affirming the zoning administrator, apparently found it sufficient that the San Remo was a residential hotel "at least in part."

The majority's reliance on the unproven assumption that no rooms could be grandfathered as a permitted conditional use is all the more puzzling given that the opinion elsewhere is quite cognizant of the prospect that some rooms in the same building may be subject to differing classifications. As the majority explains, we must "consider separately each use in a multiple-use structure," such as the San Remo, in classifying uses "for purposes of neighborhood commercial district zoning." (Maj. opn., *ante*, at p. 662, citing S.F. Planning Code, § 703.2, subd. (b)(1).)[4] The majority also recognizes that "[t]he administrative record shows that both residential and tourist rentals were significant uses of the San Remo Hotel at the relevant times. " (Maj. opn., *ante*, at p. 659.) Accordingly (and as the majority acknowledges), tourist use at the San Remo would qualify as a permitted conditional

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[4] I do not assume, as the majority suggests, "that conditional use permits are issued on a room-by-room basis." (Maj. opn., *ante*, at p. 662.) I do, however, agree with the quotation in the text from the majority that, in classifying uses for zoning purposes, we must consider separately each use in a multiple-use structure. The *need* for a conditional use permit, in other words, is determined on a room-by-room basis--as the majority acknowledges. (See maj. opn., *ante*, at p. 660 [affirming the need for a conditional use permit "[e]ven as to those rooms that had, on occasion, been lawfully rented to tourists . . . ."].)

use—and is grandfathered under the Planning Code—"*to the extent it lawfully existed when the current laws' restrictions came into effect, but does not qualify to the extent plaintiffs propose to significantly alter or expand it.*" (*Id.* at p. 662, italics added.)

The majority thus appears to recognize not only that the critical question here is the number of tourist rooms that should be grandfathered as a permitted conditional use, but also that the current record is inadequate to ascertain that number. For example, the zoning administrator described the annual unit usage reports from 1982 to 1992 as showing residents occupying between 25 and 57 of the designated residential units. "Even if only the 25-57 units actually shown to be occupied by residents were designated as residential units," the zoning administrator explained, "[plaintiffs] would still be required to procure a conditional use permit to convert *them* under the terms of Planning Code section 178(c)." (Italics added.) Yet, as the majority recognizes, the number of eligible rooms "during the relevant period" is "not clearly answered" by the zoning administrator's aggregation of usage reports over a 10-year period. (Maj. opn., *ante*, at p. 661.) Plaintiffs, for their part, offered evidence that no more than 10 to 20 percent of the hotel's room had been rented to long-term residents, which would fix the number of rooms to be converted well below the number suggested by the zoning administrator. In their complaint, they allege that no more than nine rooms should have been deemed residential.

As interesting as this dispute may be, it is beyond cavil that the current record is insufficient to resolve how many tourist rooms might be grandfathered as a permitted conditional use. Under the circumstances, a remand is appropriate to enable factual findings to be made regarding

the actual use of the hotel during the relevant period.[5] On remand, the City would also be free to argue that plaintiffs had discontinued or abandoned any permitted conditional tourist use they are able to establish. "'[A]bandonment of a nonconforming use ordinarily depends upon a concurrence of two factors: (1) An intention to abandon; and (2) an overt act, or failure to act, which carries the implication the owner does not claim or retain any interest in the right to the nonconforming use (8A McQuillin, [Municipal Corporations (3d ed. 1994)], § 25.192; 1 Anderson, American Law of Zoning, § 6.58). Mere cessation of use does not of itself amount to abandonment although the duration of nonuse may be a factor in determining whether the nonconforming use has been abandoned (101 C.J.S. Zoning § 199).'" (*Hansen Brothers Enterprises, Inc. v. Board of Supervisors* (1996) 12 Cal. 4th 533, 569 [48 Cal. Rptr. 2d 778, 907 P.2d 1324]; *see* S.F. Planning Code, § 178, subd. (d) [permitted conditional uses deemed abandoned if discontinued for three years]; S.F. Admin. Code, § 41.19 (a)(1) [a tourist unit may be rented to a permanent resident without changing the legal status of the unit]; *cf. Tenderloin Housing Clinic, Inc. v. Astoria Hotel, Inc.* (2000) 83 Cal. App. 4th 139, 144-145 [98 Cal. Rptr. 2d

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[5] It is unclear whether the critical date is in 1987, when the neighborhood commercial district ordinance took effect, or in 1982, when interim measures first took effect (and before plaintiffs resumed operation of the hotel), or some date in between. (*See* maj. opn., *ante*, at p. 659.) Because the selection of the appropriate effective date may depend in part on the evidence adduced by plaintiffs demonstrating an existing tourist use, it would be premature to resolve the issue here. Inasmuch as the parties agree that the relevant effective date lies somewhere between 1982 and 1987, the purpose of the majority's discussion of usage rates between 1988 and 1991 (*see* maj. opn., *ante*, at pp. 654-655, 659-660) is lost on me.

924].) The current record, however, renders it impossible to determine which rooms, if any, could be rented to tourists as a permitted conditional use and which rooms, if any, have abandoned or discontinued that permitted conditional use. How the majority, which is plainly aware of the significance of the hotel's historical use and the inadequacy of the record on that point, can do anything other than order a remand is a mystery.

In sum, the answer to the question framed by the majority—"Did San Francisco Properly Require Plaintiffs to Obtain a Conditional Use Permit for Full Tourist Use of the Hotel?"--is a *conditional* yes. The need to obtain a permit exists only for those rooms for which plaintiffs cannot establish tourist rental as a permitted conditional use, which is precisely the issue left unresolved by the majority. In my view, the writ petition should be granted in part and the matter remanded to permit the superior court or the appropriate administrative agency to take evidence concerning actual tourist use and to resolve any claims that tourist use was abandoned or discontinued. The majority's abrupt termination of the litigation grants the City a windfall housing replacement fee for each room that further proceedings would have revealed to be grandfathered as a permitted conditional tourist use.

II

I agree with the majority that in-lieu fees assessed under the HCO are not subject to the "rough proportionality" test articulated in *Dolan v. City of Tigard* (1994) 512 U.S. 374 [114 S. Ct. 2309, 129 L. Ed. 2d 304] (*Dolan*). *Dolan* envisioned that some "land use regulations" would not be subject to the "rough proportionality" test. (*Id.* at p. 385 [114 S. Ct. at pp. 2316-2317].) To identify which land use

regulations would be subject to the more stringent test, the court relied on two "relevant" DISTINCTIONS: between "an *adjudicative* decision to condition the [owner's] application for a building permit on an individual parcel" and "essentially *legislative* determinations classifying entire areas of the city," and between "a requirement that [the owner] *deed* portions of the property to the city" and "a *limitation* on the use [the owner] might make of her own parcel." (*Ibid.*, italics added.)

In *Ehrlich v. City of Culver City* (1996) 12 Cal. 4th 854 [50 Cal. Rptr. 2d 242, 911 P.2d 429], this court unanimously concluded that the "rough proportionality" test applied when "special, discretionary permit conditions on development by individual property owners" (*id.* at p. 881 (plur. opn. of Arabian, J.); *id.* at p. 912 (conc. & dis. opn. of Werdegar, J.)) were "adjudicatively imposed" (*id.* at p. 906 (conc. & dis. opn. of Kennard, J.); *id.* at p. 891 (conc. opn. of Mosk, J.)). Here, as the majority notes, the in-lieu fee is a product of "generally applicable legislation" (maj. opn., *ante*, at p. 669) and its calculation is subject to "no meaningful government discretion." (*Ibid.*) Under those circumstances, the in-lieu fee here must be viewed as one of those land use regulations that is not subject to the "rough proportionality" test.

This much is sufficient to answer "no" to the main question the City presented in its review petition: "Where a legislatively adopted impact fee applies equally to 500 residential hotels and 18,000 residential hotel units, is it nevertheless a 'particularized' exaction subject to 'heightened scrutiny' because it does not apply to every property in the city?" Although the majority might have stopped the takings analysis at that point, it seems prudent to me to discuss, as the majority does, the legal standard that *does* apply to the in-lieu fee here, namely that "[a] land use regulation does not effect

a taking if it 'substantially advances legitimate state interests' . . . ." (*Dolan*, *supra*, 512 U.S. at p. 385 [114 S. Ct. at p. 2316].)

Admittedly, this test is not easy of application. The Supreme Court acknowledges that it has not provided "a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests" (*Monterey v. Del Monte Dunes at Monterey, Ltd.* (1999) 526 U.S. 687, 704 [119 S. Ct. 1624, 1636, 143 L. Ed. 2d 882] other than to distinguish this requirement from that used by the high court in due process and equal protection claims. (*See ibid.*, citing *Nollan v. California Coastal Comm'n* (1986) 483 U.S. 825, 834-835, fn. 3 [107 S. Ct. 3141, 3147, 97 L. Ed. 2d 677].) As *Nollan* stated in that footnote, "our opinions do not establish that these standards are the same as those applied to due process or equal protection claims." (*Nollan*, *supra*, 483 U.S. at pp. 834-835, fn. 3 [107 S. Ct. at p. 3147].) Rather, takings jurisprudence has diverged from due process and equal protection both in "verbal formulations" and in application. (*Ibid.*) "[T]here is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical." (*Ibid.*; *see generally Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal. 4th 952, 1018-1021 [81 Cal. Rptr. 2d 93, 968 P.2d 993] (dis. opn. of Chin, J.) (*Santa Monica Beach*).)

Thus, to the extent that the majority suggests that the property owner must prove the land use regulation is arbitrary to prevail on a *takings* claim as opposed to a *due process* claim (*see* maj. opn., *ante*, at p. 674, fn. 16, quoting *Dolan*, *supra*, 512 U.S. at p. 391, fn. 8 [114 S. Ct. at p. 2320]), it

is not faithful to the distinction the high court has drawn between those two legal doctrines.[6] For the most part, however, the majority takes pains to distinguish the requirement under the takings clause that a land use regulation "substantially advance[] legitimate state interests" from the requirement of due process and equal protection that a regulation be "not arbitrary." To pass scrutiny under the takings clause, the majority says that in-lieu fees "must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development," although "the relationship between means and ends need not be so close or so thoroughly established for legislatively imposed fees as for ad hoc fees," which are subject to the "rough proportionality" test. (Maj. opn., *ante*, at p. 671.) Although this formulation makes plain that something more is required than mere rational-basis review, its meaning is still opaque. The defect, I submit, is that the majority's test is too much defined by what it is *not*, rather than by what it *is*. For the courts who will be called upon to apply this standard, we must be more illuminating.

The majority's formulation correctly describes the *subjects* of the inquiry—i.e., the governmental regulation and the public impact of the development—as well as the *intensity* of the relationship between them—i.e., a reasonable relationship. What is missing is a description of the *nature* of the relationship between the public impact of the development and the governmental regulation. On this point, I find helpful the concurring and dissenting opinion in *Pennell v. San Jose* (1988) 485 U.S. 1, 15-24 [108 S. Ct. 849, 859-864, 99 L.

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[6] Justice Chin cogently explained the meaning of *Dolan's* footnote 8 in his dissenting opinion in *Santa Monica Beach*, *supra*, 19 Cal. 4th at pages 1020 through 1021.

Ed. 2d 1] (conc. & dis. opn. of Scalia, J.). *Pennell* involved the kind of land use regulation that, like the in-lieu fees here, is not subject to the "rough proportionality" test. (See *Santa Monica Beach*, *supra*, 19 Cal. 4th at p. 968.) Justice Scalia, joined by Justice O'Connor, observed that "[t]raditional land use regulation (short of that which totally destroys the economic value of property) does not violate this [takings clause] principle because there is a *cause-and-effect* relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly." (*Pennell v. San Jose*, *supra*, 485 U.S. at p. 20 [108 S. Ct. at p. 862], italics added.)

From Justice Scalia's separate opinion, it is apparent that the missing element in the majority's formulation is the *causal* connection between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Thus, I would reformulate the standard as follows: The in-lieu fee does not violate the takings clause so long as (1) there is a cause-and-effect relationship between the owner's desired use of the property and the social evil that the fee seeks to remedy, and (2) the fee is reasonably related in both intended use and amount to that social evil. This two-part standard best implements the high court's broadly stated requirement that the fee substantially advance legitimate state interests.

III

The majority, after announcing the correct standard, strays beyond the questions presented and applies the standard to *some* of the claims in plaintiffs' complaint and then,

without any additional discussion, dismisses the remaining claims by affirming the trial court's judgment sustaining the demurrer. I would refrain from reaching the merits of these selected takings claims and, without analysis or even an acknowledgement of doing so, from summarily denying the others. Well-settled principles of appellate review counsel us to remand the matter to the lower courts to apply the correct legal standard in the first instance.

The most immediate reason for remanding to the lower courts, of course, is that we already need to remand for further factual findings to determine the number of rooms that require further permitting before they may be offered to tourists. When that is completed, plaintiffs will need to choose anew whether and, if so, how to satisfy the housing replacement requirement, "whether by constructing or bringing onto the market new units; by sponsoring such construction by a public or nonprofit private housing developer; or by paying, in lieu of such construction, a fee to a designated City housing fund." (Maj. opn., *ante*, at p. 668.) Should plaintiffs choose again to pay the in-lieu fee, the appropriate City agency will need to recalculate it, taking into account the correct number of units and their replacement cost. (*See ibid.*) Only if plaintiffs then challenge the fee imposed will we be presented with an actual case or controversy that resembles the one the majority addresses here.

Even if we were not already remanding for further factual development involving the petition for writ of administrative mandate, a remand to permit the Court of Appeal to apply the correct legal standard to plaintiffs' claims would be the prudent course. The majority finds, and I agree, that the Court of Appeal erred in analyzing plaintiffs' as-applied takings challenge under a heightened scrutiny standard. (Maj.

opn., *ante*, at pp. 668, 670.) It is our practice, where a lower court has applied an incorrect legal standard, to remand for application of the correct standard, even when a remand is not required for other reasons. (*E.g.*, *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal. 4th 1, 15 [78 Cal. Rptr. 2d 1, 960 P.2d 1031] [where the Court of Appeal applied an erroneous standard, "regard for the structure of appellate decisionmaking suggests that the case should be returned to the Court of Appeal"]; *id.* at p. 25 (conc. opn. of Mosk, J., joined by George, C. J. and Werdegar, J.) ["It is therefore appropriate to remand to the Court of Appeal for reconsideration in light of the proper standard of review"]; see also *People v. Cox* (2000) 23 Cal. 4th 665, 677-678 & fn. 7 [97 Cal. Rptr. 2d 647, 2 P.3d 1189]; *Ramirez v. Yosemite Water Co.* (1999) 20 Cal. 4th 785, 803 [85 Cal. Rptr. 2d 844, 978 P.2d 2]; *People v. Breverman* (1998) 19 Cal. 4th 142, 164, 178-179 [77 Cal. Rptr. 2d 870, 960 P.2d 1094]; *People v. Cahill* (1993) 5 Cal. 4th 478, 510 [20 Cal. Rptr. 2d 582, 853 P.2d 1037].) There is no reason to deviate from our practice in this case. Indeed, the justifications for adhering to our traditional practice are numerous and compelling.

First, no hardship exists to warrant our extraordinary intervention to bring an abrupt close to the litigation. Plaintiffs have done everything the City has ordered them to do: they have secured the permits to rent to tourists and have paid the $567,000 housing replacement fee. The only issue in the litigation, as conceded by the City at oral argument, is whether plaintiffs will get some or all of their money back--and the majority's approach plainly does not aid plaintiffs. Moreover, the majority should not be under any illusion that sustaining the demurrer will bring an end to a decade of litigation over that issue. Plaintiffs have reserved their federal claims and, if rebuffed here, will resume their federal litigation, which is now subject to *Pullman* abstention. (*See*

The San Remo Hotel v. City and County of San Francisco (9th Cir. 1998) 145 F.3d 1095, 1106 & fn. 7.)

Second, remand would give us, a *reviewing* court, the benefit of a reasoned decision applying the correct standard to the merits of plaintiffs' claims. The Court of Appeal *declined to address* plaintiffs' facial challenge on the grounds that plaintiffs "failed to seek leave of court to replead such causes of action" and that "the present state of the pleadings is insufficient to allow us to fully assess the ultimate legal validity of the facial constitutionality of the HCO." The trial court did purport to reach the merits, but relied solely on *Terminal Plaza Corp. v. City and County of San Francisco*, *supra*, 177 Cal. App. 3d 892, and *Bullock v. City and County of San Francisco* (1990) 221 Cal. App. 3d 1072 [271 Cal. Rptr. 44]. Yet, neither *Terminal Plaza* nor *Bullock* addresses the "substantially advance" branch of takings analysis. As for the as-applied challenges, the Court of Appeal applied the wrong standard, and the trial court failed to reach the merits of these claims at all, choosing instead to reject the claims categorically on the authority of *Pfeiffer v. City of La Mesa* (1977) 69 Cal. App. 3d 74 [137 Cal. Rptr. 804]. The Court of Appeal held *Pfeiffer* inapplicable for several reasons, none of which the City challenges here. (See maj. opn., *ante*, at p. 658, fn. 9.) In sum, only one category of claims has even been addressed on the merits by a lower court--the as-applied claims by the Court of Appeal--and that court applied what we have now determined to be the wrong standard. I do not view these circumstances as crying out for us to deviate from our practice of remanding to permit the lower courts to apply the correct standard in the first instance.

Third, remand for application of the correct standard would be consistent with the way the parties have framed the issues and the relief the City has sought here. The questions

presented in the City's petition for review do not invite us to resolve the merits of plaintiffs' claims. Indeed, when asked at oral argument what this court should do if it adopts (as it has) a standard not urged by either party,[7] the City's counsel replied, "I assume the court would remand for a consideration by the trial court of what standard of review the court would order to be applied."

Fourth, remand is appropriate to permit the lower courts to address the claims articulated in the complaint that are *not* discussed by the majority. The majority purports to affirm the trial court's judgment sustaining the demurrer to the entire complaint, yet limits its discussion only to a few facial and as-applied challenges to the HCO. Our task on demurrer is to determine whether "the complaint states a cause of action under *any* theory, regardless of the title under which the factual basis for relief is stated." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal. 4th 26, 38 [77 Cal. Rptr. 2d 709, 960 P.2d 513].) Viewed in this light, it is apparent that this complaint articulates a number of potential takings and other claims, none of which has yet been addressed by the majority or rejected by the Court of Appeal, including (1) that the lifetime leases effect a physical taking (*see Yee v. Escondido* (1992) 503 U.S. 519, 528 [112 S. Ct. 1522, 1529, 118 L. Ed. 2d 153] ["A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy"]);[8] (2) that the HCO

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[7] The City misperceives the applicable standard to be "akin to the rational basis test."

[8] The Court of Appeal found that plaintiffs had properly alleged a physical taking in the complaint. The City disagrees, and urges us to reverse the Court of Appeal. On this, as with the

and fee deprived plaintiffs of their reasonable investment-backed expectations; (3) that the HCO denies plaintiffs all economically viable use of the property, inasmuch as a surplus of vacant residential hotel rooms already exists in San Francisco;[9] and (4) that state law preempted the HCO.[10]

I can think of no reason for the majority's failure to address these claims, other than the fact that none of them can even remotely be shoehorned into the issues presented by the

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remaining causes of action in the complaint, the majority is silent.

[9] The federal court deemed this claim unripe because state remedies for inverse condemnation on this claim were available. (*The San Remo Hotel v. City and County of San Francisco, supra*, 145 F.3d at pp. 1101-1102.) The majority's decision to affirm the judgment sustaining the demurrer without even mentioning this claim casts grave doubt on the correctness of the federal court's understanding of state remedies--and thus will have repercussions on ripeness far beyond this case.

[10] Since the Court of Appeal, having ordered a remand to permit plaintiffs to prove up a legal nonconforming use, found it unnecessary to reach the preemption claim, it is not surprising that plaintiffs did not use their answer to the review petition to seek our review of this issue--or of the other unrelated issues that had not yet been resolved in the litigation. What *is* surprising is the majority's rush to have this court, in the first instance, opine on a number of constitutional issues in this difficult area of law despite the existence of an unaddressed, nonconstitutional basis for decision. The majority's eagerness to discard cherished views of judicial restraint (*see, e.g., People v. Hernandez* (1998) 19 Cal. 4th 835, 843 [80 Cal. Rptr. 2d 754, 968 P.2d 465] (conc. opn. of Werdegar, J.); *People v. Bennett* (1998) 17 Cal. 4th 373, 393 [70 Cal. Rptr. 2d 850, 949 P.2d 947] (conc. opn. of Werdegar, J.)) merely to facilitate an abrupt and unsolicited termination of this litigation in the City's favor is puzzling.

City's petition. But the City's decision to limit issues for review can hardly be deemed a license for us to dismiss plaintiffs' entire complaint without comment, especially where viable issues remain. To affirm the demurrer here would punish plaintiffs for complying with rule 29.3(c) of the California Rules of Court, which tells the parties that "[u]nless otherwise ordered, briefs on the merits shall be confined to those issues, and issues fairly included in them." The lesson here, if there is one, is that litigants in this court should be careful to brief against any conceivable contingency that could jeopardize any favorable ruling below, even if the arguments fall well outside the questions presented. I confess I do not think this is a good idea.

IV

I would therefore affirm the judgment of the Court of Appeal to the extent that it ordered a remand for further proceedings relating to the petition for writ of administrative mandate and affirmed the imposition of nominal penalties under the City's cross-complaint. I would reverse the Court of Appeal to the extent that it applied a heightened-scrutiny standard to plaintiffs' taking claims and would then remand the cause to enable the Court of Appeal to apply the correct legal standard. To the extent the majority prevents plaintiffs from demonstrating their entitlement to writ relief, prematurely analyzes plaintiffs' as-applied takings claims, and summarily disposes of plaintiffs' other claims without any analysis whatsoever, I respectfully dissent.

Chin, J., concurred.

BROWN, J., Dissenting.

Americans are a diverse group of hard-working, confident, and creative people molded into a nation not by common ethnic identity, cultural legacy, or history; rather, Americans have been united by a dream—a dream of freedom, a vision of how free people might live. The dream has a history. The idea that property ownership is the essential prerequisite of liberty has long been "a fundamental tenet of Anglo-American constitutional thought." (Ely, The Guardian of Every Other Right (1998) p. 43.) "Indeed, the framers saw property ownership as a buffer protecting individuals from government coercion. Arbitrary redistribution of property destroyed liberty, and thus the framers hoped to restrain attacks on property rights." (*Ibid.*) "Property must be secured, or liberty cannot exist" (Adams, A Balanced Government (1790) in Discourses on Davila (1805), reprinted in 6 The Works of John Adams (1851 ed.) p. 280), because property and liberty are, upon examination, one and the same thing.

Private property is in essence a cluster of rights inuring to the benefit of the owner, freely exchangeable in accordance with the terms of private agreements, and recognized and protected by common consent. In the case of real property, this cluster of rights includes the right to exclude persons from certain physical space. In the case of intellectual property, it may include the right to employ a valuable method or process to the exclusion of others. In other words, private property represents zones of individual sovereignty—regions of autonomy within which we make our own choices.

But private property, already an endangered species in California, is now entirely extinct in San Francisco. The City and County of San Francisco has implemented a neo-feudal

regime where the nominal owner of property must use that property according to the preferences of the majorities that prevail in the political process—or, worse, the political powerbrokers who often control the government independently of majoritarian preferences. Thus, "the lamb [has been] committed to the custody of the wolf." (6 The Works of John Adams, *supra*, at p. 280.) San Francisco has redefined the American dream. Where once government was closely constrained to increase the freedom of individuals, now property ownership is closely constrained to increase the power of government. Where once government was a necessary evil because it protected private property, now private property is a necessary evil because it funds government programs.

I. *THE SAN FRANCISCO PLANNING COMMISSION'S ZONING DECISION RESTRICTING PLAINTIFFS' ABILITY TO CONVERT THEIR HOTEL TO TOURIST USE CONSTITUTES A TAKING REQUIRING COMPENSATION*

The City and County of San Francisco (the City), like other cities, seeks to provide affordable housing to its low-income residents. The most egalitarian way to achieve this goal would be to distribute the cost of subsidies as broadly as possible, but the forces attacking private property in California--though claiming the moral high ground--have proved themselves anything but egalitarian in their approach. In 1981, the City enacted the Residential Hotel Unit Conversion and Demolition Ordinance (S.F. Admin. Code, ch. 41) (the HCO; all citations to HCO are to chapter 41 of the San Francisco Administrative Code), the details of which are summarized in the majority opinion, *ante*, at pages 650 through 652. The HCO places the burden of providing low-income housing disproportionately on a relatively small group

of hotel owners. These hotel owners certainly did not cause poverty in San Francisco; indeed, for a long time they voluntarily helped relieve the problem by leasing some or all of their rooms on a long-term basis to low-income residents. But as the economy of the City shifted, this residential use of their hotel rooms became increasingly unprofitable, and hotel owners began to abandon the residential rental business. It was then that the City, facing constitutional constraints on taxation and other sources of revenue, began to see the hotel owners as the most convenient--if not the most equitable--off-budget solution to its housing problems. If the City were devising a tax that would subsidize low-cost housing, I strongly doubt it would limit its tax to the owners of a few hundred residence hotels, but in the often surreal world of political expedience, these ill-fated business people were ordered to use their property for the benefit of the poor, thereby greatly depressing the market value of that property.

The express purpose of the HCO was to preserve the City's stock of low-income residential housing by requiring hotel owners to continue leasing their rooms as residences, or to replace those residential units if they chose to convert the rooms to tourist use. (HCO, §§ 41.2, 41.3.) Obviously, the HCO is facially unconstitutional. If a person took my car and asked a ransom for its return, he or she would be guilty of theft. But what if the City, seeking to provide transportation to the poor, orders me to operate an informal carpool, or if I prefer, to buy the City a replacement car? When presented with a similar hypothetical at oral argument, the San Francisco City Attorney declared such a rule a mere "regulation of use." I disagree. The essence of private property is the right to use that property as one sees fit and for one's own advantage. The police power permits the government to regulate that use so as to promote health, safety, and the general welfare, but it does not permit the

government to achieve its social agenda by ordering a political minority to dedicate its property to the benefit of a group the government wishes to favor. As I explain in more detail in part II below, such a regulation amounts, in practical effect, to a transfer of title and requires the government to pay its way.

But constitutional issues aside the City had another problem with its HCO. In 1985, the state Legislature enacted the Ellis Act, which unequivocally guarantees the right of property owners to abandon the residential rental business. Government Code section 7060, subdivision (a), provides: "No public entity . . . shall, by statute, ordinance, or regulation, or by administrative action implementing any statute, ordinance or regulation, compel the owner of any residential real property to offer, or to continue to offer, accommodations in the property for rent or lease." If this clear language left any doubt about the continuing viability of the HCO, that doubt was finally resolved against the City in *Bullock v. City and County of San Francisco* (1990) 221 Cal. App. 3d 1072, 1102 [271 Cal. Rptr. 44] (*Bullock*), which held that the Ellis Act preempts the HCO. "We conclude," said the court in *Bullock*, "that [the HCO] is preempted by the Ellis Act and is therefore *invalid to the extent it is applied to prevent plaintiff from going out of the residential hotel business*." (*Bullock*, at p. 1102, italics added.) In other words, state law expressly permits property owners to do what the HCO bars them from doing: it permits them to stop leasing to residents.

The City, however, was unwilling so easily to concede defeat. The Ellis Act affirms the continuing power of public entities "to grant or deny . . . zoning . . . approvals." (Gov. Code, § 7060.1, subd. (b).) This provision seems reasonable on its face: property owners are free to stop leasing to

residents, but they still must obey zoning laws regulating the new use to which they intend to put their property. (*See also* Gov. Code, § 7060.7.) Conveniently, the City amended its zoning laws shortly after the Ellis Act became law. As related in the majority opinion (maj. opn., *ante*, at pp. 652-653), one effect of this change was to require the owners of the San Remo Hotel to obtain a conditional use permit before "intensif[ying]" any use of their property as a tourist hotel. (S.F. Planning Code, § 178, subd. (c).) The parties dispute the extent to which the rooms in the San Remo Hotel were ever, in fact, being used as residences, but as the majority points out (maj. opn., *ante*, at pp. 658-663), at least some of those rooms were historically used as residences, and to the extent the owners sought to convert *those* rooms to tourist use, the change required a permit under the new zoning ordinance. In short, the City put in place a zoning mechanism by which it could try to achieve the goals of its preempted HCO, if it chose to do so.

But the City had to proceed cautiously. *Bullock* made clear that the City could not use zoning laws pretextually to bar landlords from exercising their rights under the Ellis Act. As the court stated, "[n]othing in the Ellis Act gives any landlord invoking its protection the unilateral power to effect what amounts to a rezoning of his property . . . . [P] The City is . . . not precluded from seeking to have enjoined a violation of [zoning] ordinances . . ., *so long as this claim is not used as a pretext for halting* [*the property owner's*] *departure from the residential hotel business*." (*Bullock*, *supra*, 221 Cal. App. 3d at p. 1104, italics added.) Implicitly conceding that the Ellis Act is in direct conflict with the HCO, the majority argues (maj. opn., *ante*, at p. 663) the Ellis Act has no effect here because the record does not establish that plaintiffs complied with its notice requirements. (*See* Gov. Code, § 7060.4.) But the power of local governments to implement

the Ellis Act by requiring notice in no way negates the fact that state law has preempted the City from using zoning as a way to discourage property owners from exiting the residential rental business. Government Code section 7060.4 permits local governments to enact *notice requirements*, but it does not permit those governments to enact zoning restrictions that abrogate the very protections the Ellis Act affords. Therefore, whether plaintiffs followed the notice requirements of the Ellis Act is beside the point; the state has occupied this area of law, and the City may not enact and enforce contrary laws. Nevertheless, after the City amended its zoning laws, the preempted HCO was poised to become the ghost that drove zoning decisions in San Francisco.

Here, for example, the owners of the San Remo Hotel sought to convert their hotel to full tourist use. The City's Planning Department told them that—consistent with the recent amendments to the zoning laws—they would need a conditional use permit. Whether to issue a conditional use permit is an adjudicative decision that is exercised at the discretion of the planning commission (S.F. Planning Code, §§ 303, 316, 316.8), and the planning commission exercised its discretion here by conditioning the San Remo Hotel permit on, among other things, compliance with the preempted HCO. The owners of the San Remo Hotel met this condition by paying, in protest, a $567,000 "in lieu fee" (representing a portion of the appraised cost of building replacement housing) and brought this action alleging, among other things, a taking without just compensation in violation of the state Constitution.

This constellation of facts makes this case indistinguishable from *Ehrlich v. City of Culver City* (1996) 12 Cal. 4th 854 [50 Cal. Rptr. 2d 242, 911 P.2d 429] (*Ehrlich*). *Ehrlich* addressed the same problem that the United

States Supreme Court recognized in *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825 [107 S. Ct. 3141, 97 L. Ed. 2d 677] (*Nollan*) and *Dolan v. City of Tigard* (1994) 512 U.S. 374 [114 S. Ct. 2309, 129 L. Ed. 2d 304] (*Dolan*). When a government agency has discretionary authority to permit or prohibit a new use of property, the risk arises that governmental greed will consciously or unconsciously distort the decisionmaking process, causing the agency to exact a condition from the property owner that has nothing to do with mitigating the effects of the proposed new use. This sort of regulatory leveraging, taken to its extreme, might cause a government to impose "stringent land-use regulation which [it] then waives to accomplish other purposes" (*Nollan*, at p. 837, fn. 5 [107 S. Ct. at p. 3149]), and this concern warrants a more searching inquiry by a reviewing court than might otherwise be appropriate.

In *Nollan*, for example, a California agency conditioned a permit to develop beachfront property on dedication of a public easement. The easement, which permitted the public to cross the property to gain access to the ocean, "utterly fail[ed] to further the end" of mitigating the impact of the proposed development on ocean views, and therefore lacked the "essential nexus" that the federal Constitution required and amounted to "'extortion.'" (*Nollan*, *supra*, 483 U.S. at p. 837 [107 S. Ct. at pp. 3148-3149].) Similarly, in *Dolan* the City of Tigard conditioned a permit to greatly expand a retail sales complex on dedication of a strip of property as a pathway for pedestrians and bicycles. The high court held that a permit condition must be "'rough[ly] proportional[]'" "in nature and extent" to mitigating "the impact of the proposed development" (*Dolan*, *supra*, 512 U.S. at p. 391 [114 S. Ct. at pp. 2319-2320] and the City of Tigard had failed "to quantify its findings" that the pathway would mitigate increases in traffic. (*Id.* at p. 395 [114 S. Ct. at p. 2322].) In

Ehrlich, we unanimously extended the principle of *Nollan* and *Dolan* to a case in which a city demanded a *monetary* fee from a developer rather than a dedication of an interest in real property, noting that the same risk of governmental abuse was present. (*Ehrlich*, *supra*, 12 Cal. 4th at p. 876 (plur. opn. of Arabian, J.); *id.* at pp. 899-901 (conc. opn. of Mosk, J.); *id.* at p. 907 (conc. & dis. opn. of Kennard, J.); *id.* at p. 912 (conc. & dis. opn. of Werdegar, J.).) The majority reaffirms the holding of *Ehrlich* today. (Maj. opn., *ante*, at pp. 666-667.)

Here, as in *Ehrlich*, a public agency (the City's Planning Commission) has made a discretionary adjudicative decision with respect to a specific permit application. Contrary to the argument of the majority (maj. opn., *ante*, at pp. 668-670), this case does not involve a legislatively imposed fee for which the risks of abuse are arguably held in check by the political process. (Maj. opn., *ante*, at pp. 670-671.) Rather, in an adjudicative proceeding concerning a single property owner's permit request, the planning commission chose to require HCO compliance and thereby used the leverage it gained by regulating commercial uses of property to exact a $567,000 fee. On these facts, the fee must be roughly proportional in nature and extent to mitigating the impact of the proposed new use of the property. (*Ehrlich*, *supra*, 12 Cal. 4th at p. 876 (plur. opn. of Arabian, J.); *id.* at pp. 899-901 (conc. opn. of Mosk, J.); *id.* at p. 907 (conc. & dis. opn. of Kennard, J.); *id.* at p. 912 (conc. & dis. opn. of Werdegar, J.).) In short, because we are dealing with a discretionary decision of the planning commission rather than direct enforcement of the HCO, the government's decision here, like the decision at issue in *Ehrlich*, was adjudicative.

The majority tries to sidestep this gaping hole in its argument with a footnote asserting that under applicable

zoning laws "conversion of residential rooms to commercial use is unconditionally *prohibited* above the first floor in the North Beach district *except* insofar as permitted by the HCO (S.F. Planning Code, §§ 722.38, 790.84)." (Maj. opn., *ante*, at p. 669, fn. 11.) The majority concludes: "The planning commission, therefore, had no discretion to permit such change in use absent HCO compliance." (*Ibid.*) In other words, the majority argues the planning commission's decision here was legislative, not adjudicative, thereby permitting the majority to exploit the exception it reads into *Ehrlich* for legislatively created permit fees.

First, the majority simply misreads the City's Planning Code. San Francisco Planning Code section 722.38 prohibits conversion from residential to nonresidential use above the first floor, but section 790.84 of that code does not limit the exception from this prohibition to cases where the property owner *complies* with the HCO. Rather, section 790.84 creates an exception for conversions that are "defined and regulated in [the HCO]." The San Francisco Planning Code therefore remains neutral with respect to HCO compliance. It simply provides that its flat prohibition on conversions does not apply when the HCO applies, thereby giving space within which the HCO can operate. Nothing in the Planning Code requires the planning commission to enforce the HCO, nor does the Planning Code state that conversions are prohibited except "as permitted by the HCO." (Maj. opn., *ante*, at p. 669, fn. 11.) In other words, the Planning Code leaves a regulatory gap with respect to conversions regulated in the HCO, and the commission has, *in its discretion*, chosen to fill that gap by requiring HCO compliance. Its decision was not compelled by any legislative rule, and therefore it is no different from the decision at issue in *Ehrlich*. At the very least, the legislative rule was ambiguous, and the planning commission's interpretation of the rule was in that sense adjudicative.

Second, the majority's exception for legislatively created permit fees is mere sophism, particularly where the legislation affects a relatively powerless group and therefore the restraints inherent in the political process can hardly be said to have worked. (*Cf. United States v. Carolene Products Co.* (1938) 304 U.S. 144, 152, fn. 4 [58 S. Ct. 778, 783-784, 82 L. Ed. 1234].) If the agency in *Nollan* had passed a rule requiring all beachfront property owners to dedicate an easement as a condition of developing their properties, those easements would have no better mitigated the effects of development (and they would have been no less objectionable) than the easement that the agency exacted adjudicatively. Of course, when the government may prohibit a certain use of property entirely, it may opt instead to place conditions on that use (*Nollan*, *supra*, 483 U.S. at p. 836 [107 S. Ct. at p. 3148]), but the conditions must be related in some real way to the justification advanced for a complete prohibition. (*Id.* at p. 837 [107 S. Ct. at pp. 3148-3149].) Otherwise, the government has transformed the police power into an efficient way to raise money by regulating political minorities and then selling exemptions from the regulatory scheme, without any real intent to advance the scheme's purported purpose. It becomes "as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury." (*Ibid.*) The government, in effect, says: We have the power; therefore, pay us to leave you alone. By any measure, that is extortion. Moreover, it turns the takings clause on its head. Instead of the government having to pay compensation to property owners, the government now wants property owners to compensate *it* to get back the fair value of property the government took away through regulation.

A public agency can just as easily extort unfair fees legislatively from a class of property owners as it can

adjudicatively from a single property owner. The nature of the wrong is not different or less abusive to its victims, but the scope of the wrong is multiplied many times over. Therefore, I believe *Ehrlich* should apply whenever the risk is great that greed for public revenues has driven public regulatory policy. In other words, where a legislative scheme imposes a burdensome fee on a small class of property owners as a condition to buying relief from a regulation, I believe careful judicial scrutiny is appropriate, including finding a close link between the fee and the purpose of the regulation. In light of the majority's decision, however, we can be sure that agencies will now act legislatively, rather than adjudicatively, and thereby insulate their actions from close judicial scrutiny.

In addition, the HCO is structured in such a way that the same sort of discretionary, case-specific decisionmaking that triggered our holding in *Ehrlich* also takes place under the HCO. The fee that a hotel owner may pay under the HCO so as to buy the right to lease residential rooms to tourists is a fixed portion of the estimated cost of replacing the lost residential housing. (HCO, § 41.13, subd. (a)(4), (5).) Though this cost estimate must be based on two independent appraisals (*ibid.*), it nevertheless permits a discretionary element to enter into the process, with the result that the City and the property owner inevitably end up in a back-and-forth negotiation over the amount of the fee. Obviously, the City has the upper hand in this negotiation--because it is holding the conversion permit hostage--and therefore the City is free to squeeze as large a fee as possible from the property owner. That dynamic brings into play all the concerns that justified our holding in *Ehrlich*, and therefore the same careful scrutiny ought to apply.

Finally, and most importantly, the majority fails to appreciate that, if the San Francisco Planning Code somehow requires across-the-board compliance with the HCO, then the Ellis Act preempts that requirement, just as it preempts the HCO itself. The zoning exception to the Ellis Act permits the City to place certain limits on how a property owner may use property, but as *Bullock* held, the City may not use that zoning power to erect barriers to a property owner's decision to exit the residential rental business, even if the effect is to reduce the residential housing stock of the City. (*Bullock*, *supra*, 221 Cal. App. 3d at p. 1104.) In other words, the planning commission, acting under the zoning exception to the Ellis Act, might be able to block the owners of the San Remo Hotel from renting more rooms to tourists, *assuming its purpose is to limit the number of tourist hotel rooms in the area*, but the commission may not do so *to protect the City's stock of low-cost residential housing*, because that would be inconsistent with the state law right of property owners to stop leasing to residents. Nevertheless, here the majority argues (and the City concedes) that the preservation of low-cost housing was the planning commission's purpose when it required HCO compliance. (*See*, *e.g.*, maj. opn., *ante*, at pp. 672-679.) That purpose was simply impermissible under the Ellis Act, and even if it were somehow permissible, the majority acknowledges that at least *some* rooms at the San Remo Hotel were historically used as tourist rooms (maj. opn., *ante*, at pp. 658-663), and therefore it cannot, in any case, justify the planning commission's decision to charge a conversion fee for *all* rooms. (*Cf. id.* at pp. 667-678.)

Of course, despite the Ellis Act problem, the majority and the City have no choice but to assert that the planning commission's purpose was the preservation of residential housing, because if the planning commission had some other purpose, it could not—under any standard of review (rational

basis, reasonable relationship, or rough proportionality)—have attached the condition that the owners of the San Remo Hotel take steps to preserve low-cost residential housing. Just as in *Nollan*, where the easement providing access to the beach was not related in any way to mitigating the obstruction of an ocean view, similarly here the preservation of low-cost housing is not related in any way to mitigating the impact of more tourist hotel rooms in the neighborhood of the San Remo Hotel. In other words, by requiring HCO compliance as a condition for renting more rooms to tourists, the planning commission has revealed its true colors: it does not care about the number of hotel rooms in the area; what it really cares about is preventing property owners from exiting the residential rental business. But this the City simply cannot do under the Ellis Act—if not for the fact that the majority has chosen to turn a blind eye.

II. *THE HCO IS FACIALLY UNCONSTITUTIONAL UNDER THE TAKINGS CLAUSE OF THE CALIFORNIA CONSTITUTION*

Our takings jurisprudence—both state and federal—has become so labyrinthine and compartmentalized that attempts to find just the right standard for the case often entirely miss the underlying point of the exercise. We speak of ad hoc inquiries, relevant factors, per se takings, and means-end relationships. We chip away at the problem with separate lines of cases addressing distinct issues such as development permits and price controls. And all these efforts, valid as far as they go, leave us still groping for a basic conceptual approach that takes seriously the constitutional prohibition against uncompensated takings of private property. Thus, like the Wizard of Oz, we mystify our audience with the look and feel of great erudition, while concealing the humble reality that we have yet to solve the problem in a satisfactory way.

But, here, we need not consider all these arcane standards and fragmentary theories. These are analytical tools relevant to *tough* cases—cases in which it is unclear whether property *has* been taken. This is *not* a tough case. Here, property unquestionably has been taken. No matter the analysis, the facts of this case come down to one thing—the City and County of San Francisco has expropriated the property and resources of a few hundred hotel owners in order to ameliorate—off budget and out of sight of the taxpayer—its housing shortage. In short, this ordinance is not a matter of efficiently organizing the uses of private property for the common advantage; instead, it is expressly designed to shift wealth from one group to another by the raw exercise of political power, and as such, it is a per se taking requiring compensation.

The majority rejects the legal theories on which the property owners have proceeded, but it fails to confront the more basic issue that prefigures all others: the City has replaced taxation and the provision of public services with a regulation that orders certain people to use their private property to do the government's work. If the relevant case law is sparse, it is only because no public agency has ever been so bold.

"Private property may be taken or damaged for public use only when just compensation . . . has first been paid to . . . the owner." (Cal. Const., art. I, § 19.) In a simple world where "property" is understood to refer to tangible property and "tak[ing]" is understood to be a formal transfer of title, this constitutional injunction is relatively easy to apply. But such a narrow application of the takings clause would trivialize the right. Restriction of any one of the several rights that constitute private property in effect takes that property. For example, a property owner cares little about the

formalities of title possession when the property in question has been rendered nearly valueless by regulations prohibiting its most productive uses. In that case, the regulations have deprived the owner of so many of the rights that originally constituted the property that the property has, in effect, ceased to exist, or it has become a mere empty shell. Furthermore, in a complex and increasingly service and information-based economy, the constitutional protection of intangible property is just as critical as the protection of physical property was to an agrarian and manufacturing economy.

Nevertheless, in countless ways, government takes property—in the sense of regulating its use—without always having to compensate the owner. In *Penna. Coal Co. v. Mahon* (1922) 260 U.S. 393, 413 [43 S. Ct. 158, 159, 67 L. Ed. 322, 28 A.L.R. 1321] (*Penna. Coal Co.*), Justice Holmes noted that "[g]overnment hardly could go on" if it had to pay its way every time a regulation restricted the use of property. The law has long recognized, for example, that government might, in the exercise of the police power, act to proscribe a nuisance, and in so doing it need not pay compensation. (*See, e.g.*, Civ. Code, § 3479; Code Civ. Proc., § 731.) Holmes spoke of "an average reciprocity of advantage" whereby a property regulation ultimately works for the enrichment of all, though it imposes specific limitations on the use of certain property. (*Penna. Coal Co.*, at p. 415 [43 S. Ct. at p. 160].)

For example, business owners on a popular shopping street might generally agree that their properties would be more attractive, and hence more valuable, if all the businesses used small, attractive signs rather than huge, garish billboards. Nevertheless, without regulation, competitive forces will inevitably cause business signs to become ever larger and more visually intrusive. No business owner wants

to be the only one on a shopping street to have a small sign, and transaction costs often prevent owners from coming together to negotiate an agreement that would work to their common advantage. In that case, a regulation that has the immediate effect of reducing property value by restricting sign size, has the indirect effect of enhancing that value for all affected businesses. (*See generally* Epstein, Takings: Private Property and the Power of Eminent Domain (1985) pp. 195-215.)

A similar justification can be articulated in the case of the regulations proscribing nuisance. For example, if the law prohibits a property owner from operating a slaughterhouse in a residential neighborhood, the immediate effect might be to lower incrementally the value of the regulated property, but the indirect effect is to place that property in a neighborhood rendered more desirable for residential use, thereby enhancing its value. Again the same rationale can be extended to justify zoning and planning regulations that constrain the freedom of developers but enhance all property values over the long term by making cities more attractive and efficient. Finally, when a regulatory scheme creates new value for a property owner by establishing an artificial monopoly—as, for example, might be true in the case of a utility—the government can regulate the profit the property owner gains from its government-created preferential status. All these examples point to the same fundamental principle: property owners, given a choice, will prefer to own property in a community having appropriate and mutually beneficial regulations, because such property has greater value by reason of the regulation. Accordingly, regulatory authority is not inherently confiscatory in all cases.

But the corollary of this rule—one I think is implicit in the takings clause of the state Constitution—is that a regulation *is*

a taking if, rather than promoting "an average reciprocity of advantage" (*Penna. Coal Co., supra*, 260 U.S. at p. 415 [43 S. Ct. at p. 160]), it is merely designed to benefit one class of citizens at the expense of another; that is, if it simply shifts wealth by a raw act of government power. The government, in that case, has deprived the property owner of a right associated with his property, shifting that right to another party, but it has in no sense compensated the owner by enhancing, in some real way, the value of the rights the owner has retained.

In short, it might be perfectly legitimate for the City to help the low-income residents of San Francisco, but it may not do so at the expense of some small class of persons simply by legislating a transfer of property rights. Of course, providing assistance to low-income residents of the community incrementally benefits all members of the community both by removing the blight of homelessness and by representing a general moral good, but here the burden of this common benefit falls so disproportionately on 500 business owners in a city of 776,700 residents that careful judicial scrutiny is warranted. Where the impact is so disproportionate, we cannot say that we have "an acceptable level of assurance that *over time* the burdens associated with collectively determined improvements will have been distributed 'evenly' enough so that everyone will be a net gainer." (Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law* (1967) 80 Harv. L.Rev. 1165, 1225, original italics.) Moreover, it simply stretches the police power too far to suggest that the City is somehow regulating the use of property for the common advantage when it redistributes wealth by ordering a political minority to dedicate its property to the benefit of another group. The police power can no more be used in this way than it could be used to order a rich

man to give a beggar a dime. Here, the primary beneficiary of the regulation is not the common advantage but the low-income individuals who obtain the inexpensive housing. Laudable as that goal might be, the takings clause precludes the government from achieving the goal by police power regulation.

Nor can the HCO be justified under the theory that the City is merely requiring property owners to continue the existing use of their property. (*See, e.g., Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 125 [98 S. Ct. 2646, 2659-2660, 57 L. Ed. 2d 631].) Such a rule would punish a property holder for using property in a way that proved popular. Moreover, it fails to recognize the effect of shifting economic conditions and therefore locks property into unproductive uses. But most important, such a rule represents a dedication of property rights to the public, and in all fairness the public should have to pay for these rights, just as a private party would. For these reasons, I would not extend the holding of *Penn Central* beyond its unique factual context, including the fact that the regulatory authority in that case might have permitted a more moderate development of the property than the one the property owner sought and it gave the property owner transferable development rights as compensation. (*Id.* at pp. 136-137 [98 S. Ct. at pp. 2665-2667].)

Here, the City has essentially said to 500 unlucky hotel owners: We lack the public funds to fill the need for affordable housing in San Francisco, so you should solve the problem for us by using your hotels to house poor people. The City might as well have ordered the owners of small grocery stores to give away food at cost. The federal takings clause "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should

be borne by the public as a whole." (*Armstrong v. United States* (1960) 364 U.S. 40, 49 [80 S. Ct. 1563, 1569, 4 L. Ed. 2d 1554].) I believe the same principle underlies our state takings clause. Accordingly, I would find the HCO facially unconstitutional.

Conclusion

I agree with part I of the concurring and dissenting opinion of Justice Baxter to the effect that the San Francisco Planning Code does not require a conditional use permit for tourist use of hotel rooms that were traditionally dedicated to tourist use, and therefore with respect to those rooms, a conversion fee was inappropriate under any takings standard. In addition to the points Justice Baxter makes, I would find the HCO preempted by the Ellis Act and facially unconstitutional, and therefore that the plaintiffs were free to disregard the HCO, and the HCO cannot render tourist use of their hotel illegal. Furthermore, because the HCO was in effect void, plaintiffs' admission under the HCO concerning residential use of their hotel is not binding on them. Moreover, the admission was based on a 1981 version of the HCO, which permitted tourist use of the rooms during the all-important summer season (1981 S.F. Admin. Code, § 41.16, subd. (a)(3)(B)), and therefore the City cannot use that admission against plaintiffs now that it seeks to restrict plaintiffs *under a different ordinance* from tourist use during *any* season. Therefore, I would affirm the Court of Appeal's decision with respect to the writ petition.

I would also affirm the Court of Appeal's conclusion that the *Ehrlich* "'rough proportionality'" standard (*Ehrlich, supra*, 12 Cal. 4th at p. 876) applies to the San Francisco Planning Commission's decision to require HCO compliance. This decision was adjudicative both in fact and form, and

even if it were not, it would nevertheless be extortionate in nature and therefore suspect. I would also affirm the Court of Appeal's conclusion that, under the *Ehrlich* standard, the City has failed to show a sufficiently close link between its fee, which will subsidize low-cost residential housing, and the regulatory purpose of limiting the number of hotel rooms in the neighborhood (that being the only purpose that the planning commission could have had without impinging on plaintiffs' rights under the Ellis Act).

Once again a majority of this court has proved that "'If enough people get together and act in concert, they can take something and not pay for it.'" (*Landgate, Inc. v. California Coastal Com.* (1998) 17 Cal. 4th 1006, 1035, fn. 1 [73 Cal. Rptr. 2d 841, 953 P.2d 1188] (dis. opn. of Brown, J.), quoting O'Rourke, Parliament of Whores (1991) p. 232.) But theft is still theft. Theft is theft even when the government approves of the thievery. Turning a democracy into a kleptocracy does not enhance the stature of the thieves; it only diminishes the legitimacy of the government. Like Justice Rehnquist, I "see no reason why [constitutional protections of property rights] should be relegated to the status of a poor relation." (*Dolan*, *supra*, 512 U.S. at p. 392 [114 S. Ct. at p. 2320].) The right to express one's individuality and essential human dignity through the free use of property is just as important as the right to do so through speech, the press, or the free exercise of religion. Nevertheless, the property right is now—in California, at least—a hollow one. I dissent and hope the plaintiffs find a more receptive forum in the federal courts.

APPENDIX F

SAN FRANCISCO RESIDENTIAL HOTEL UNIT CONVERSION AND DEMOLITION ORDINANCE

SEC. 41.1. TITLE.

This Chapter shall be known as the Residential Hotel Unit Conversion and Demolition Ordinance. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.2. PURPOSE.

It is the purpose of this ordinance to benefit the general public by minimizing adverse impact on the housing supply and on displaced low income, elderly, and disabled persons resulting from the loss of residential hotel units through their conversion and demolition. This is to be accomplished by establishing the status of residential hotel units, by regulating the demolition and conversion of residential hotel units to other uses, and by appropriate administrative and judicial remedies. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.3. FINDINGS.

The Board of Supervisors finds that:

(a) There is a severe shortage of decent, safe, sanitary and affordable rental housing in the City and County of San Francisco and this shortage affects most severely the elderly, the disabled and low-income persons.

(b) The people of the City and County of San Francisco, cognizant of the housing shortage of San Francisco, on November 4, 1980, adopted a declaration of policy to increase the city's housing supply by 20,000 units.

(c) Many of the elderly, disabled and low-income persons and households reside in residential hotel units.

(d) A study prepared by the Department of City Planning estimated that there were only 26,884 residential hotel units in the City in December of 1979, a decrease of 6,098 such units from 1975. Since enactment of this Chapter, residential hotel units have continued to decrease, at a slower rate: in 1981, there were 20,466 residential hotel units as defined by this Chapter; in 1988, there were 18,723 residential hotel units, a decrease of 1,743 over a period of 7 years. The decrease is caused by vacation, conversion or demolition of residential hotel units. Continued vacation, conversion or demolition of residential hotel units will aggravate the existing shortage of affordable, safe and sanitary housing in the City and County of San Francisco.

(e) As a result of the removal of residential hotel units from the rental housing market, a housing emergency exists within the City and County of San Francisco for its elderly, disabled and low-income households.

(f) Residential hotel units are endangered housing resources and must be protected.

(g) The Board of Supervisors and the Mayor of the City and County of San Francisco recognized this housing emergency and enacted an ordinance which established a moratorium on the demolition or conversion of residential

hotel units to any other use. The moratorium ordinance became effective on November 21, 1979.

(h) The conversion of residential hotel units affects those persons who are least able to cope with displacement in San Francisco's housing market.

(i) It is in the public interest that conversion of residential hotel units be regulated and that remedies be provided where unlawful conversion has occurred, in order to protect the resident tenants and to conserve the limited housing resources.

(j) The tourist industry is one of the major industries of the City and County of San Francisco. Tourism is essential for the economic well being of San Francisco. Therefore, it is in the public interest that a certain number of moderately priced tourist hotel units be maintained especially during the annual tourist season between May 1st and September 30th.

(k) Tourist activity has increased steadily in San Francisco since 1983. There are currently approximately 23,000 tourist hotel units in the City and over 3,000 additional such units will be added by 1988 through new construction. However, there are presently only 18,723 residential hotel units and this number is not increasing. In addition, rents for residential hotel units have risen an average of 23 percent annually since 1980, making such units less and less affordable as a housing resource for the elderly, disabled and low-income persons. Since the adoption of this ordinance, hotel owners have begun to leave residential units vacant during the non- tourist season (October 1st - April 30th) in order to rent these units to tourists at high daily rental rates during the tourist season (May 1st - September 30th). This activity, which further reduces the available supply of low and moderate income

housing in San Francisco, is not presently prohibited under this Chapter. In order to assure that residential hotel owners do not continue to withhold these available residential units from prospective permanent residents during the non-tourist season, it is necessary to restrict the tourist season rental of vacant residential hotel units. Such a restriction will not interfere with San Francisco's tourism, which remains essential to the economic well-being of the City.

(l) Since enactment of this Chapter, it has become apparent that portions of this Chapter were difficult and extremely costly to interpret and enforce, resulting in an inability to fulfill the essential intent of this Chapter and to prevent illegal conversions.

(m) Since enactment of this Chapter, residential units have been converted to tourist units and the hotel operators have paid the 40 percent in-lieu fee to the City. This amount, 40 percent of the cost of construction of comparable units plus site acquisition cost, has not been adequate to provide replacement units. Federal, state and local funds were incorrectly assumed at that time to be available and sufficient to make up the shortfall between the 40 percent in-lieu fee and actual replacement costs. For example, in 1979 the federal government was spending 32 billion dollars on housing and is spending only 7 billion dollars in 1989.

(n) Certain uses provide both living accommodation and services, such as health care, personal care and counseling, to residents of the City. Examples of such uses are hospital, skilled nursing facility, AIDS hospice, intermediate care facility, asylum, sanitarium, orphanage, prison, convent, rectory, residential care facility for the elderly, and community care facility. Such facilities are often operated in building owned or leased by non-profit

organizations and provide needed services to the City's residents. To subject such facilities to the provisions of this Chapter may deter future development of such facilities. It is desirable that such facilities exist and the City should encourage construction and operation of such facilities.

(o) In addition, a form of housing facilities called "transitional housing" provides housing and supportive services to homeless persons and families and is intended to facilitate the movement of homeless individuals and families to independent living or longer term supportive residences in a reasonable amount of time. Transitional housing has individual living quarters with physical characteristics often similar to a residential hotel (i.e. accommodations which provide privacy to residents) and provides a source of interim housing for homeless individuals and families seeking to live independently.

(p) The City's public, quasi-public and private social agencies serving the elderly and needy persons often find it difficult to immediately locate suitable housing units for such persons returning to independent living after hospitalization or upon leaving skilled-nursing or intermediate care facilities within a short time after their discharge from a health facility. Such persons often will require minimum supervision and other interim social service support. The provision of a stable number of housing units for such emergency needs until permanent housing can be secured and supportive services arranged are necessary and desirable for the City. Emergency housing will have physical characteristics similar to "transitional housing" and is often intended to be occupied for a period of less than one month.

(q) The City also wishes to provide positive incentive to encourage residential hotel owners and operators to comply

with the terms of this Chapter. Hotel owners have expressed a need to rent certain residential units on a short term basis during the winter months. In an effort to address this need and to encourage compliance with this Chapter, the City wishes to provide an opportunity to hotel owners who have complied with the terms of this Chapter to rent a limited number of residential units to tourists during the winter months. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.4. DEFINITIONS.

(a) **Certificate of Use**. Following the initial unit usage and annual unit usage determination pursuant to the provisions of Sections 41.6 and 41.10 below, every hotel shall be issued a certificate of use specifying the number of residential and tourist units herein.

(b) **Comparable Unit**. A unit which is similar in size, services, rental amount and facilities, and which is located within the existing neighborhood or within a neighborhood with similar physical and socioeconomic conditions.

(c) **Conversion**. The change or attempted change of the use of a residential unit as defined in subsection (q) below to a tourist use, or the elimination of a residential unit or the voluntary demolition of a residential hotel. However, a change in the use of a residential hotel unit into a non-commercial use which serves only the needs of the permanent residents, such as resident's lounge, storeroom or common area, shall not constitute a conversion within the meaning of this Chapter.

(d) **Disabled Person.** A recipient of disability benefits.

(e) **Elderly Person.** A person 62 years of age or older.

(f) **Emergency Housing.** A project which provides housing and supportive services to elderly or low-income persons upon leaving a health facility and which has its primary purpose of facilitating the return of such individuals to independent living. The emergency housing shall provide services and living quarters pursuant to Section 41.13 herein and may be provided as part of a "transitional housing" project.

(g) **Hotel**. Any building containing six or more guest rooms intended or designed to be used, or which are used, rented or hired out to be occupied or which are occupied for sleeping purposes and dwelling purposes by guests, whether rent is paid in money, goods, or services. It includes motels, as defined in Chapter XII, Part II of the San Francisco Municipal Code (Housing Code), but does not include any jail, health facilities as defined by Section 1250 of the Health and Safety Code, asylum, sanitarium, orphanage, prison convent, rectory, residential care facility for the elderly as defined in Section 1569.2 of the Health and Safety Code, residential facilities as defined in Section 1502 of the Health and Safety Code or other institution in which human beings are housed or detained under legal restraint, or any private club and nonprofit organization in existence on September 23, 1979; provided, however, that nonprofit organizations which operated a residential hotel on September 23, 1979 shall comply with the provisions of Section 41.8 herein.

(h) **Interested Party.** A permanent resident of a hotel, or his or her authorized representative, or a former tenant of a hotel who vacated a residential unit within the past 90 days preceding the filing of complaint or court proceeding to enforce the provisions of this Chapter. Interested party shall also mean any nonprofit organization, as defined in Section 41.4(k), which has the preservation or improvement of

housing as a stated purpose in its articles of incorporation and/or bylaws.

(i) **Low-income Household**. A household whose income does not exceed 60 percent of the median income for the San Francisco Standard Metropolitan Statistical Area as published by the United States Department of Housing and Urban Development and Housing and Community Development Act of 1974.

(j) **Low-Income Housing.** Residential units whose rent may not exceed 30 percent of the gross monthly income of a low-income household as defined in subsection (i) above.

(k) **Nonprofit Organization**. An entity exempt from taxation pursuant to Title 26, Section 501 of the United States Code.

(l) **Operator**. An operator includes the lessee or any person or legal entity whether or not the owner, who is responsible for the day-to-day operation of a residential hotel and to whom a hotel license is issued for a residential hotel.

(m)**Owner**. Owner includes any person or legal entity holding any ownership interest in a residential hotel.

(n) **Permanent Resident.** A person who occupies a guest room for at least 32 consecutive days.

(o) **Posting or Post**. Where posting is required by this Chapter, material shall be posted in a conspicuous location at the front desk in the lobby of the hotel, or if there is no lobby, in the public entranceway. No material posted may be removed by any person except as otherwise provided in this Chapter.

(p) **Residential Hotel.** Any building or structure which contains a residential unit as defined in (q) below unless exempted pursuant to the provisions of Sections 41.5 or 41.7 below.

(q) **Residential Unit.** Any guest room as defined in Section 203.7 of Chapter XII, Part II of the San Francisco Municipal Code (Housing Code) which had been occupied by a permanent resident on September 23, 1979. Any guest room constructed subsequent to September 23, 1979 or not occupied by a permanent resident on September 23, 1979 shall not be subject to the provisions of this Chapter; provided however, if designated as a residential unit pursuant to Section 41.6 of this Chapter or constructed as a replacement unit, such residential units shall be subject to the provisions of this Chapter.

(r) **Tourist Hotel.** Any building containing six or more guest rooms intended or designated to be used for commercial tourist use by providing accommodation to transient guests on a nightly basis or longer. A tourist hotel shall be considered a commercial use pursuant to City Planning Code Section 216(b) and shall not be defined as group housing permitted in a residential area under City Planning Code Section 209.2.

(s) **Tourist Unit.** A guest room which was not occupied on September 23, 1979, by a permanent resident or is certified as tourist unit pursuant to Sections 41.6, 41.7 or 41.8 below. Designation as a tourist unit under this Chapter shall not supersede any limitations on use pursuant to the Planning Code.

(t) **Transitional Housing.** A project which provides housing and supportive services to homeless persons and families or low-income households at risk of becoming

homeless which has as its purpose facilitating the movement of homeless individuals or at-risk low-income households to independent living within a reasonable amount of time. The transitional housing shall provide services and living quarters as approved by the Planning Commission that are similar to the residential unit being replaced pursuant to Section 41.13 herein and shall comply with all relevant provisions of City ordinances and regulations. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.5. APPLICABILITY OF THIS CHAPTER.

The provisions of this Chapter shall not apply to:

(a) The change in use of a residential unit where the unit has been found to be unfit for human habitation prior to November 23, 1979 and ordered to be vacated by the Department of Public Health; or

(b) A hotel wherein 95 percent of the guest rooms were tourist units on September 23, 1979; or

(c) A unit which rented for over $1,000 per month on September 23, 1979; or

(d) A hotel in which 95 percent of the total number of guest rooms rented for more than $1,000 per month on September 23, 1979; or

(e) A building which was unlawfully converted to a rooming house or hotel in violation of the provisions of the City Planning Code; or

(f) A building which meets the requirements of Section 41.7(c) below for a claim of exemption for partially-completed conversions; or

(g) A building which meets the requirements of Section 41.7(b) below for a claim of exemption for low-income housing; or

(h) A building which is lawfully approved by the City after September 23, 1979, and is not a replacement unit pursuant to Section 41.13 herein, so long as it is operated by a public entity or a nonprofit organization as a jail, health facilities as defined by Section 1250 of the Health and Safety Code, asylum, sanitarium, orphanage, prison, convent, rectory, residential care facility for the elderly as defined in Section 1569.2 of the Health and Safety Code, residential facilities as defined in Section 1502 of Health and Safety Code, or other institution in which human beings are housed or detained under legal restraint. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.6. INITIAL STATUS DETERMINATION.

(a) **Filing of Initial Status Determination; Time Limit.** Within 30 calendar days of the mailing date of the summary of the ordinance and the prescribed reporting forms, the owner or operator of each hotel shall file either a statement of exemption, a claim of exemption based on low-income housing, a claim of exemption based on partially completed conversion, or an initial unit usage report as specified below. All filing shall be accompanied by supporting evidence. However, upon application by an owner or operator and upon showing a good cause therefor, the Director of the Department of Building Inspection may grant an extension of time not to exceed 30 days for filing. Owner or operator shall

post a notice on the day of filing that a copy of the initial status determination document filed with the Director of the Department of Building Inspection is available for inspection between the hours of 9:00 a.m. and 5:00 p.m. Monday through Friday.

(b) **Filing of Initial Unit Usage Report.** All hotels not covered by the exemptions in Sections 41.5, 41.7 or 41.8 must file an initial unit usage report containing the following:

(1) The number of residential and tourist units in the hotel as of September 23, 1979;

(2) The designation by room number and location of the residential units and tourist units as of seven calendar days prior to the date of filing the report;

(3) The total number of residential and tourist rooms in the hotel as of seven calendar days prior to date of filing the report.

(c) **Insufficient Filing.** If the Director of the Department of Building Inspection or his designee determines that additional information is needed to make a determination, the Director shall request the additional information in writing. The owner or operator shall furnish the requested information within 15 calendar days upon receipt of the written request. Owner or operator shall immediately post a notice that a copy of the requested information is available for inspection between the hours of 9:00 a.m. and 5:00 p.m. Monday through Friday at the Department of Building Inspection. If the requested information is not furnished, all the guest rooms not supported by evidence shall be deemed to be residential units.

(d) **Certification of Units.** The Director of the Department of Building Inspection shall review the information and accompanying supporting data. A certified copy of hotel tax returns for the calendar year 1979 may be used to establish the number of tourist units and the Director of the Department of Building Inspection or the Director's designee may personally inspect units to establish the number of tourist units. If, in the opinion of the Director of the Department of Building Inspection, the initial unit usage report is supported by adequate supporting evidence, the Director shall certify the number of residential and tourist units within 90 calendar days of its submission. The owner or operator shall have the burden of proving the number of tourist units claimed by a preponderance of evidence.

Notwithstanding any other provisions in this Chapter, if an owner or operator took possession of the hotel operation after September 23, 1979 and before June 15, 1981, and if the owner or operator can demonstrate that good cause exists why he/she cannot obtain supporting evidence from the previous owner or operator to file the initial report, the owner or operator shall base his/her filing on information available to him/her two weeks after he/she took possession of the hotel; any units which are vacant on that date shall be allocated equally between tourist and residential uses; provided that a permanent resident may rebut this presumption by clear and convincing evidence.

After the Director of the Department of Building Inspection certifies the number of residential and tourist units, the Director shall issue a certificate of use. The Certificate of Use shall be posted permanently in the lobby or entranceway of the hotel.

(e) **Failure to File Statement of Exemption, Claim of Exemption or Initial Unit Usage Report.** If no initial unit usage report, or statement of exemption, or a claim of exemption based on partially completed conversion, or a claim of exemption based on low-income housing for all of the guest rooms, is filed for a hotel within the time set forth in Section 41.6(a), the Director of Department of Building Inspection shall mail a notice to the owner or operator of record by registered or certified mail stating that all the rooms in the hotel shall be deemed residential units unless the owner or operator files unit usage report within 10 calendar days of the mailing date of said notice and that a late filing fee of $50 will be assessed in addition to the fee set forth in Section 41.11 of this Chapter. If the owner or operator fails to submit a unit usage report within 10 calendar days after notification by the Department of Building Inspection, a certificate of use for residential units only shall be issued.

(f) **Appeal of Initial Determination.** An owner or operator may appeal the initial unit status determination by the Director of the Department of Building Inspection provided that there was no challenge pursuant to the provisions of subsection (g) below, and further provided that an appeal is filed within 10 calendar days of the mailing of the certification. If an appeal is filed, a copy of the notice of appeal shall be posted by the owner or operator and a hearing pursuant to the provisions of Section 41.8(b) shall be scheduled.

(g) **Challenge; Standing; Statute of Limitation.** Challenges to the information contained in the initial status determination report filed by the owner or operator may be filed by an interested party in writing provided that it is submitted within 15 calendar days from the date the report to the Department of Building Inspection is filed. Upon receipt

of a challenge, a hearing shall be held by the Director of the Department of Building Inspection or his designee pursuant to the provisions of Section 41.11(b). The owner or operator shall have the burden of proving by a preponderance of evidence that the information filed is correct.

(h) **Reporting Forms for Initial Unit Usage Report.** Compliance by any party or by the City of San Francisco with notice, filing, challenge, designation of unit and certification requirements of Ordinance 330-81 regarding the initial status of units shall satisfy similar requirements set forth in this Chapter and all such notices, filings, challenges, designations or certificates shall have the same force and effect as if made pursuant to this subsection. (Added by Ord. 121-90, App. 4/12/90; amended by Ord. 134-01, File No. 001926, App. 7/6/2001)

SEC. 41.7. STATEMENTS OF EXEMPTION; APPLICABILITY OF THIS CHAPTER.

(a) **Statement of Exemption Based on Inapplicability of This Chapter.** Any hotel claiming that this Chapter does not apply, under the provisions of Sections 41.5(a) through 41.5(d), shall file a statement of exemption specifying the basis for the exemption. Any hotel claiming exemption under the provisions of Sections 41.5(b) through 41.5(d) shall also state the total number of guest rooms and the number of residential hotel units with monthly rent over $1,000 per month.

(b) **Claim of Exemption Based on Low-Income Housing.** To qualify for a claim of exemption based on low-income housing, the units to be rehabilitated meet the following requirements:

(1) A claim for this exemption has been filed and the requisite fees paid to the Department of Building Inspection no later than 60 calendar days after the effective date of this ordinance;

(2) With the exception of ground floor commercial space, the entire building must be completely occupied as low-income housing;

(3) The Director of the Department of Building Inspection finds that the proposed elimination of a unit is necessary to comply with Building Code and Housing Code requirements; and

(4) Alternate guest rooms are made available within the building to the displaced permanent residents; or

(5) In those circumstances where it is necessary to relocate a permanent resident off site, the permanent resident shall receive the actual moving expenses and the difference between the rent at the time of relocation and the rent of the temporary housing during the period of rehabilitation.

(6) The owner or operator and successors in interest shall continue to maintain all units in the rehabilitated hotel as low-income housing for 25 years. A deed restriction on such use shall be submitted to the City Attorney's Office for approval. An approved copy of the deed restriction shall be forwarded to the Director of the Department of Building Inspection and the original shall be filed with the Recorder by the owner or operator.

(c) **Claim of Exemption Based on Partially Completed Conversion.** A claim of exemption based on partially completed conversion shall not be approved until and unless

owner or operator shows that all of the following requirements are met:

(1) An application for partially completed conversion was filed no later than 60 calendar days after the effective date of this ordinance;

(2) The owner or operator has commenced work on extensive Capital Improvements and Rehabilitation Work prior to November 23, 1979, as defined in Section 37.2 of the San Francisco Administrative Code (the San Francisco Rent Stabilization and Arbitration Ordinance) and has completed such work on at least 35 percent of the units intended to be converted or has expended 40 percent of the total sum budgeted for said work;

(3) The owner or operator or previous owner or operator shall have clearly demonstrated his/her intention to convert all of the residential units in the subject building to tourist units as of November 23, 1979. Satisfactory evidence of intention to convert may be demonstrated by the following factors, including but not limited to:

(A) Whether an architect has been engaged to prepare plans and specifications; or

(B) Whether applications for construction work have been received; or

(C) Whether applications for the necessary permits have been submitted to all relevant city departments; or

(D) Whether a building permit has been issued.

(4) Each permanent resident displaced by the conversion is offered relocation assistance as set forth in Section 41.17(b) below; and

(5) For each vacant residential unit converted, but not occupied by a permanent resident, a sum of $250 per unit not to exceed a total of $10,000 shall be deposited in the San Francisco Residential Hotel Preservation Account of the Repair and Demolition Fund established pursuant to Section 203.1 of the San Francisco Building Code (being Chapter 1, Article 2, Part II of the San Francisco Municipal Code) to be used exclusively for the repair, purchase and rehabilitation of residential hotel units by agencies of the City and County of San Francisco and to be administered by the Department of Public Works.

(d) Consistent with Planning Code Section 183, any unit deemed to be a tourist unit which has remained continuously vacant for three years following the zoning change in a zoning district not allowing tourist hotels shall lose its nonconforming status, and may be opened only for residential hotel or group housing uses. (Added by Ord. 121-90, App. 4/12/90; amended by Ord. 134-01, File No. 001926, App. 7/6/2001)

SEC. 41.8. REQUIREMENTS FOR NONPROFIT ORGANIZATIONS.

(a) **Initial Unit Usage Report.** Within 90 days of the adoption of this amended Chapter, the Department of Building Inspection shall notify all nonprofit organizations operating hotels that the nonprofit organization must comply with the Initial Status Determination provisions of Section 41.6 herein.

(b) **Annual Unit Usage Report.** All nonprofit organizations operating hotels with residential units shall

comply with the provisions of Section 41.10 herein in the event that the status of the units in the hotel changes from the designation contained in the Initial Unit Usage Report.

(c) **One-for-one Replacement.** If a nonprofit organization seeks to demolish residential units or remove residential units from housing use, or sells or otherwise transfers the building containing residential use, it shall comply with the provisions of Section 41.13 of this Chapter.

(d) **Applicability of this Chapter.** This chapter shall not apply to a hotel which has a certificate of use for all residential units but contained no permanent residents on September 23, 1979, provided that the hotel is owned, leased or operated by a nonprofit organization at the time this exemption is sought. The owner, operator or lessee of such a hotel must file with the Director of the Department of Building Inspection evidence to support such exemption. If the exemption is approved, the Director shall issue a certificate of use designating all the hotel's units as tourist units; provided, however, that the certificate shall not be issued until the hotel owner, operator or lessee has paid any penalties imposed under Section 41.6(e) or Section 41.10(f) or (g), or released any liens imposed under Section 41.20(d). (Added by Ord. 121-90, App. 4/12/90; amended by Ord. 134-01, File No. 001926, App. 7/6/2001)

SEC. 41.9. RECORDS OF USE.

(a) **Daily Log.** Each residential hotel shall maintain a daily log containing the status of each room, whether it is occupied or vacant, whether it is used as a residential unit or tourist unit and the name under which each adult occupant is registered. Each hotel shall also provide receipts to each adult occupant, and maintain copies of the receipts, showing: the

room number; the name of each adult occupant; the rental amount and period paid for; and any associated charges imposed and paid, including but not limited to security deposits. The daily log shall be available for inspection pursuant to the provision of Section 41.11(c) of this Chapter upon demand by the Director of the Department of Building Inspection or the Director's designee between the hours of 9 a.m. and 5 p.m., Monday through Friday unless the Director of the Department of Building Inspection and the City Attorney reasonably believe that further enforcement efforts are necessary for specified residential hotels, in which case the Department of Building Inspection shall notify the hotel owner or operator that the daily logs shall be available for inspection between the hours of 9 a.m. and 7 p.m.

(b) **Weekly Report.** Following the initial determination, an owner or operator of residential units shall post on each Monday before 12 noon the following information:

(1) The number of tourist units to which the owner or operator is currently entitled and the date the certificate of use was last issued;

(2) The number of guest rooms which were used as tourist units each day of the preceding week. Evidence of compliance with requirements imposed hereunder shall be preserved by the owner or operator for a period of not less than two years after each posting is required to be made. The owner or operator shall permit the Director of the Department of Building Inspection or his designee to inspect the hotel records and other supporting evidence to determine the accuracy of the information posted. (Added by Ord. 121-90, App. 4/12/90; amended by Ord. 134-01, File No. 001926, App. 7/6/2001)

SEC. 41.10. ANNUAL UNIT USAGE REPORT.

(a) **Filing.** On November 1st of each year every hotel owner or operator subject to this Chapter shall file with the Department of Building Inspection an Annual Unit Usage Report containing the following information:

(1) The total number of units in the hotel as of October 15th of the year of filing;

(2) The number of residential and tourist units as of October 15th of the year of filing;

(3) The number of vacant residential units as of October 15th of the year of filing; if more than 50 percent of the units are vacant, explain why;

(4) The average rent for the residential hotel units as of October 15th of the year of filing;

(5) The number of residential units rented by week or month as of October 15th of the year of filing; and

(6) The designation by room number and location of the residential units and tourist units as of October 15th of the year of filing. Owner or operator shall maintain such designated units as tourist or residential units for the following year unless owner or operator notifies in writing the Department of Building Inspection of a redesignation of units; owner or operator may redesignate units throughout the year provided they notify the Department of Building Inspection in writing by the next business day following such redesignation and maintain the proper number of residential and tourist units at all times. The purpose of this provision is to simplify enforcement efforts while providing owner or operator with

reasonable and sufficient flexibility in designation and renting of rooms;

(7) The nature of services provided to the permanent residents and whether there has been an increase or decrease in the services so provided;

(8) A copy of the Daily Log, showing the number of units which are residential, tourist or vacant on October 1st, February 1st, May 1st and August 1st of the year of filing.

(b) **Notice of Annual Unit Usage Report.** On the day of filing, the owner or operator shall post a notice that a copy of the Annual Unit Usage Report submitted to the Department of Building Inspection is available for inspection between the hours of 9:00 a.m. and 5:00 p.m. Monday through Friday, which notice shall remain posted for 30 days.

(c) **Extension of Time for Filing.** Upon application by an owner or operator and upon showing good cause therefor, the Director of the Department of Building Inspection may grant one extension of time not to exceed 30 days for said filing.

(d) **Certificate of Annual Unit Usage Report.** After receipt of a completed Annual Unit Usage Report, the Department of Building Inspection shall issue a certified acknowledgment of receipt.

(e) **Renewal of Hotel License and Issuance of New Certificate of Use.** As of the effective date of this Chapter, no hotel license may be issued to any owner or operator of a hotel unless the owner or operator presents with his/her license application a certified acknowledgment of receipt from the Department of Building Inspection of the Annual Unit Usage Report for the upcoming year.

(f) **Insufficient Filing; Penalties.** The Director of the Department of Building Inspection authorized to assess a penalty as set forth below for insufficient filing, with interest on the penalty accruing at the rate of one and one-half percent per full month, compounded monthly from the date the penalty is due as stated in the Director's written notification below.

If the Director or the Director's designee determines that additional information is needed to make a determination, he shall send both the owner and operator a written request to furnish such information within 15 calendar days of the mailing of the written request. The letter shall state that if the requested information is not furnished in the time required, the residential and tourist units shall be presumed to be unchanged from the previous year and that the Director shall impose a $500 penalty for failure to furnish the additional information within the 15-day period. If the Director does not timely receive the information, the Director shall notify both the owner and operator, by mail, that the Director is imposing a $500 penalty which must be paid within 30 days of the mailing of the notification, and that interest on the penalty shall accrue from the expiration of the 30 days at the rate of one and one-half percent per full month, compounded monthly. The written notification shall state that if the penalty is not paid, a lien to secure the amount of the penalty, plus the accrued interest, will be recorded against the real property pursuant to the provisions of Section 41.20(d) of this Chapter.

(g) **Failure to File Annual Unit Usage Report; Penalties.** The Director of the Department of Building Inspection is authorized to assess penalties as set forth below for failure to file an Annual Unit Usage Report, with interest on penalties accruing at the rate of one and one-half percent

per full month, compounded monthly from the date the penalty is due as stated in the Director's notification below.

If the owner or operator fails to file an Annual Unit Usage Report, the Director or the Director's designee shall notify the owner and operator by registered or certified mail and shall post a notice informing the owner and operator that unless submission of the Annual Unit Usage Report and application for renewal of the hotel license is made within 15 calendar days of the mailing of the letter, the residential and tourist units shall be presumed to be unchanged from the previous year, and the Director shall impose a penalty of $300 per month of each month the annual report is not filed. If the Director does not receive the report the Director shall notify both the owner and operator, by mail that the Director is imposing the appropriate penalty, as prorated, which must be paid within 30 days of the mailing of the notification and that interest on the penalty shall accrue from the expiration of the 30 days at the rate of one and one-half percent per full month, compounded monthly. The written notification shall state that if the penalty is not paid, a lien to secure the amount of the penalty, plus the accrued interest, will be recorded against the real property pursuant to the provisions of Section 41.20(d) of this Chapter.

(h) **Appeal of Annual Usage Determination.** An owner or operator may appeal the annual unit usage determination by the Director of the Department of Building Inspection provided that there was no challenge pursuant to the provisions of subsection (i) below, and further provided that an appeal is filed within 20 calendar days from the date of annual unit usage determination. If an appeal is filed, a copy of the notice of appeal shall be posted by the owner or operator and a hearing pursuant to the provisions of Section 41.11(b) shall be scheduled.

(i) **Challenge; Standing; Statute of Limitation.** Any interested party may file a challenge to the information contained in the annual unit usage report filed by the owner or operator provided that such a challenge is in writing and is submitted within 30 calendar days from the date the report to the Department of Building Inspection is filed. Upon receipt of a challenge, a hearing pursuant to the provisions of Section 41.11(b) shall be scheduled. The owner or operator shall have the burden of proving by a preponderance of evidence that the information filed is correct. (Added by Ord. 121-90, App. 4/12/90; amended by Ord. 134-01, File No. 001926, App. 7/6/2001)

SEC. 41.11. ADMINISTRATION.

(a) **Fees.** The owner or operator shall pay the following filing fees to the Department of Building Inspection to cover its costs of investigating and reporting on eligibility. See Section 333.2, Hotel Conversion Fee Schedule, Part II, Chapter 1 of the San Francisco Municipal Code (Building Code) for the applicable fees. The party that brings an unsuccessful challenge to a report pursuant to this Article shall be liable for the change in Section 333.2, Hotel Conversion Fee Schedule. Unsuccessful Challenge, Part II, Chapter 1 of the San Francisco Municipal Code (Building Code). Fees shall be waived for an individual who files an affidavit under penalty of perjury stating that he or she is an indigent person who cannot pay the filing fee without using money needed for the necessities of life.

SEE SAN FRANCISCO MUNICIPAL CODE (BUILDING CODE) SECTION 333.2 HOTEL CONVERSION FEE SCHEDULE

(b) **Hearing.**

(1) **Notice of Hearing.** Whenever a hearing is required or requested in this Chapter, the Director of the Department of Building Inspection shall, within 45 calendar days, notify the owner or operator of the date, time, place and nature of the hearing by registered or certified mail. The Director of the Department of Building Inspection shall appoint a hearing officer. Notice of such a hearing shall be posted by the Department of Building Inspection. The owner or operator shall state under oath at the hearing that the notice remained posted for at least 10 calendar days prior to the hearing. Said notice shall state that all permanent residents residing in the hotel may appear and testify at the public hearing, provided that the Department of Building Inspection is notified of such an intent 72 hours prior to the hearing date.
(2) **Pre-hearing Submission.** No less than three working days prior to any hearing, parties to the hearing shall submit written information to the Department of Building Inspection including, but not limited to, the following: the request or complaint, the statement of issues to be determined by the Hearing Officer; and a statement of the evidence upon which the request or complaint is based.
(3) **Hearing Procedure.** If more than one hearing for the same hotel is required, the Director of the Department of Building Inspection shall consolidate all of the appeals and challenges into one hearing; however, if a civil action has been filed pursuant to the provisions of Section 41.20(e) of the Chapter, all hearings on administrative complaints of unlawful conversions involving the same hotel shall be abated until such time as final judgment has been entered in the civil action; an interested party may file a complaint in intervention. The hearing shall be tape recorded. Any party to the appeal may, at his/her own expense, cause the hearing to be recorded by a certified court reporter. The hearing

officer is empowered to issue subpoenas upon application of the parties seven calendar days prior to the date of the hearing. During the hearing, evidence and testimony may be presented to the hearing officer. Parties to the hearing may be represented by counsel and have the right to cross-examine witnesses. All testimony shall be given under oath. Written decision and findings shall be rendered by the hearing officer within twenty working days of the hearing. Copies of the findings and decision shall be served upon the parties to the hearing by registered or certified mail. A notice that a copy of the findings and decisions is available for inspection between the hours of 9:00 a.m. and 5:00 p.m. Monday through Friday shall be posted by the owner or operator.

(4) **Administrative Review.** Unless otherwise expressly provided in this Chapter, any decision of the hearing officer shall be final unless a valid written appeal is filed with the Board of Permit Appeals within 15 days following the date of the hearing officer's written determination. Such an appeal may be taken by any interested party as defined by Section 41.4 (g) herein.

(c) **Inspection.** The Director of the Department of Building Inspection shall conduct, from time to time, on-site inspections of the daily logs, other supporting documents and units listed as vacant in the daily logs to determine if owner or operator has complied with the provisions of this Chapter. In addition, the Director of the Department of Building Inspection or the Director's designee shall conduct such an inspection as soon as practicable upon the request of a current or former occupant of the hotel. If upon such an inspection, the Director or Director's designee determines that an apparent violation of the provisions of this Chapter has occurred, he/she shall post a notice of apparent violation informing the permanent residents of the hotel thereof or shall

take action as set forth in Section 41.11(d) and (e) below. This notice shall remain posted until the Director of the Department of Building Inspection, or the Director's designee, determines that the hotel is no longer in violation of the provisions of this Chapter.

(d) **Criminal Penalties for Violations.** Any person or entity wilfully failing to maintain daily logs or provide and maintain receipts as provided in Sections 41.9(a) and (b) of this Chapter, or failing to post materials as provided in Sections 41.6(a), (c) and (f), 41.9(b), 41.10(b), (g) and (h), 41.11(b) (3), 41.12(b)(10) and 41.18(b) and (c) of this Chapter or wilfully providing false information in the daily logs shall be guilty of an infraction for the first such violation or a misdemeanor for any subsequent violation, and the complaint charging such violation shall specify whether the violation charged is a misdemeanor or an infraction.

If charged as an infraction, the penalty upon conviction therefor shall be not less than $100 or more than $500.

If charged as a misdemeanor, the penalty upon conviction therefor shall be a fine of not less than $500 or more than $1,000 or imprisonment in the county jail, not exceeding six months, or both fine and imprisonment.

Every day such violation shall continue shall be considered as a new offense.

For purposes of Sections 41.11(d) and (e), violation shall include, but not limited to, intentional disobedience, omission, failure or refusal to comply with any requirement imposed by the aforementioned Sections or with any notice or order of the Director of the Department of Building Inspection or the

Director of Public Works regarding a violation of this Chapter.

(e) **False Information Misdemeanor.** It shall be unlawful for an owner or operator to wilfully provide false information to the Director of the Department of Building Inspection or the Director's designees. Any owner or operator who files false information shall be guilty of a misdemeanor. Conviction of a misdemeanor hereunder shall be punishable by a fine of not more than $500 or by imprisonment in the County Jail for a period not to exceed six months, or by both. (f) The Director of the Department of Building Inspection may impose a penalty of $250 per violation for failure to maintain daily logs or for failure to provide receipts to occupants as required under Section 41.9 above and for failure to post materials as required under Sections 41.6(a), (c) and (f), 41.9(b), 41.10(b), (g) and (h), 41.11(b) (3), 41.12(b)(10), and 41.18(b) and (c). In order to impose such penalties, the Director shall notify both the owner and operator by certified mail that the Director is imposing the penalty or penalties, which must be paid within 30 days of the mailing of the notification. The written notification shall state that if the penalty is not paid, a lien to secure the amount of the penalty will be recorded against the real property pursuant to the provisions of Section 41.20(d) of this Chapter.

(g) **Costs of Enforcement.** The proceeds from the filing fees and civil fines assessed shall be used exclusively to cover the costs of investigation and enforcement of this ordinance by the City and County of San Francisco. The Director of the Department of Building Inspection shall annually report these costs to the Board of Supervisors and recommend adjustments thereof.

(h) **Inspection of Records.** The Department of Building Inspection shall maintain a file for each residential hotel which shall contain copies of all applications, exemptions, permits, reports and decisions filed pursuant to the provisions of this Chapter. All documents maintained in said files, except for all tax returns and documents specifically exempted from the California Public Record Act, shall be made available for public inspection and copying.

(i) **Promulgation of Rules and Regulations.** The Director of the Department of Building Inspection shall propose rules and regulations governing the appointment of an administrative officer and the administration and enforcement of this Chapter. After reasonable notice and opportunity to submit written comment are given, final rules and regulations shall be promulgated. (Added by Ord. 121-90, App. 4/12/90; amended by Ord. 134-01, File No. 001926, App. 7/6/2001)

SEC. 41.12. PERMIT TO CONVERT.

(a) Any owner or operator, or his/her authorized agent, of a residential hotel may apply for a permit to convert one or more residential units by submitting an application and the required fee to the Central Permit Bureau.

(b) The permit application shall contain the following information:

(1) The name and address of the building in which the conversions are proposed; and

(2) The names and addresses of all owners or operators of said building; and

(3) A description of the proposed conversion including the nature of the conversion, the total number of units in the building, their current uses; and

(4) The room numbers and locations of the units to be converted; and

(5) Preliminary drawings showing the existing floor plans and proposed floor plans; and

(6) A description of the improvements or changes proposed to be constructed or installed and the tentative schedule for start of construction; and

(7) The current rental rates for each residential unit to be converted; and

(8) The length of tenancy of the permanent residents affected by the proposed conversion; and

(9) A statement regarding how one-for-one replacement of the units to be converted will be accomplished, including the proposed location of replacement housing if replacement is to be provided off- site; and

(10) A declaration under penalty of perjury from the owner or operator stating that he/she has complied with the provisions of Section 41.14(b) below and his/her filing of a permit to convert. On the same date of the filing of the application, a notice that an application to convert has been filed shall be posted until a decision is made on the application to convert.

(c) Upon receipt of a completed application to convert or demolish, the Department of Building Inspection shall send

the application to the Department of City Planning for review and shall mail notice of such application to interested community organizations and such other persons or organizations who have previously requested such notice in writing. The notice shall identify the hotel requesting the permit, the nature of the permit, the proposal to fulfill the replacement requirements of Section 41.13 herein, and the procedures for requesting a public hearing. Owner or operator shall post a notice informing permanent residents of such information.

(d) Any interested party may submit a written request within 15 days of the date notice is posted pursuant to subsection (c) above to the City Planning Commission to schedule and conduct a public hearing on the proposed conversion in order to solicit public opinion on whether to approve or deny a permit to convert or demolish residential units and to determine whether proposed replacement units are "comparable units" as defined in Section 41.4(b) herein. (Added by Ord. 121-90, App. 4/12/90; amended by Ord. 134-01, File No. 001926, App. 7/6/2001)

SEC. 41.13. ONE-FOR-ONE REPLACEMENT.

(a) Prior to the issuance of a permit to convert, the owner or operator shall provide one-for-one replacement of the units to be converted by one of the following methods:

(1) Construct or cause to be constructed a comparable unit to be made available at comparable rent to replace each of the units to be converted; or

(2) Cause to be brought back into the housing market a comparable unit from any building which was not subject to the provisions of this Chapter; or

(3) Construct or cause to be constructed or rehabilitated apartment units for elderly, disabled or low-income persons or households which may be provided at a ratio of less than one-to-one; or construct or cause to be constructed transitional housing which may include emergency housing. The construction of any replacement housing under this subsection shall be evaluated by the City Planning Commission in accordance with the provisions of Section 303 of the City Planning Code. A notice of said City Planning Commission hearing shall be posted by the owner or operator 10 calendar days before the hearing; or

(4) Pay to the City and County of San Francisco an amount equal to 80 percent of the cost of construction of an equal number of comparable units plus site acquisition cost. All such payments shall go into a San Francisco Residential Hotel Preservation Fund Account. The Department of Real Estate shall determine this amount based upon two independent appraisals; or

(5) Contribute to a public entity or nonprofit organization, who will use the funds to construct comparable units, an amount at least equal to 80 percent of the cost of construction of an equal number of comparable units plus site acquisition cost. The Department of Real Estate shall determine this amount based upon two independent appraisals. In addition to compliance with all relevant City ordinances and regulations, the public entity or nonprofit organization and the housing development proposal of such public entity or nonprofit organization shall be subject to approval by the Mayor's Office of Housing.

(A) Such contribution shall be paid to the approved public entity or nonprofit organization in installments from an escrow account supervised by the Mayor's Office of Housing,

upon application by such public entity or nonprofit organization to the Mayor's Office of Housing, for specified expenditures, including but not limited to site acquisition costs, architect's fees, and construction costs; such payment shall be approved by the Mayor's Office of Housing prior to release of funds.

(B) The permit to convert shall be issued by the City when owner or operator deposits the full amount of funds in an escrow account described in subsection 41.13(a)(5)(A) above, or provides other form of non- refundable security acceptable to the City Attorney and the Mayor's Office of Housing.

(C) In the event that the public entity or nonprofit organization is unable to complete construction of the replacement housing, any unpaid amounts shall be released to the City. All such funds shall go into a San Francisco Residential Hotel Preservation Fund Account.

(b) Any displaced permanent resident relocated to replacement units provided under Subdivision (a) above shall be deemed to have continued his occupancy in the converted unit for the purpose of administering Subsection (k) of Section 37.2, San Francisco Administrative Code (San Francisco Rent Stabilization and Arbitration Ordinance).

(c) Any replacement units shall continue to be subject to the provisions of this Chapter.

(d) In the event that a completed application for a permit to convert is filed by a hotel owner or operator no later than the effective date of this amended Chapter, and such hotel owner or operator elects to provide one-for-one replacement of the residential units pursuant to Section 41.13(a) (4) or

Section 41.13(a) (5) herein, the hotel owner or operator shall be obligated to pay to the City and County of San Francisco an amount equal to 40 percent of the cost of construction of an equal number of comparable units plus site acquisition cost, provided that such hotel owner or operator shall pay such amount to the City or provide to the City security for such payment in a form satisfactory to the Mayor's Office of Housing and the City Attorney within 90 days following the date that the Department of Building Inspection determines that the application for a permit to convert is complete, or, if necessary, 10 days following final action, including any appeals, by the Planning Commission or appellate body, or 10 days following the Department of Real Estate's determination of such amount, whichever occurs latest. In the event that a hotel owner or operator elects to provide one-for-one replacement pursuant to Section 41.13(a)(2) or (a)(5) herein and the Mayor's Office of Housing has not approved a proposal or organization thereunder prior to the effective date of this amended Chapter, the Department of Building Inspection shall not reject such application as incomplete for such lack of information. If a hotel owner or operator applies for a permit to convert using the one-for-one replacement option described in 41.13(a)(2) or (a)(5) and the Mayor's Office of Housing does not approve a housing development proposal or a nonprofit organization, or such project fails to progress through no fault of the owner or operator, such applicant shall be permitted to provide one-for-one replacement pursuant to Section 41.13(a)(4) at 40 percent of the cost of construction of an equal number of comparable units plus site acquisition costs, provided that such applicant files the application under Section 41.13(a)(2) or (a)(5) no later than the effective date of this amended Chapter. The hotel owner or operator shall identify such housing proposal or nonprofit organization within 180 days of the effective date of this amended Chapter. In the event that the Mayor's Office

of Housing finds that the permit applicant has acted in good faith in seeking a project, the Mayor's Office of Housing may exercise its reasonable discretion to extend the provisions of this subsection for an additional 180 days. In the event that a project approved by the Mayor's Office of Housing fails to move forward through no fault of the permit applicant, the applicant may substitute another project within six months of being notified by the Mayor's Office of Housing of a failure of the prior project to move forward. The Mayor's Office of Housing may extend this period for an additional 180 days to identify such new proposal. The City shall issue a permit to convert under this subsection 41.13(d) only if the hotel owner or operator has either paid the 40-percent in lieu fee to the City pursuant to Section 41.13(a)(4) herein or complied with the requirements of Sections 41.13(a)(2) or (a)(5) as applicable. In the event that a hotel owner or operator has not complied with any of these requirements and the City has not issued a permit to convert or if the Mayor's Office of Housing has not found the hotel owner or operator has acted in good faith in seeking a project pursuant to subsections 41.13(a)(2) or (a)(5) or this subsection, no later than 180 days following the effective date of this amended Chapter, or such later date as herein provided, this Subsection 41.13(d) shall no longer be applicable, City shall refund any amounts deposited as security pursuant to the terms herein, and such hotel owner or operator shall comply with all applicable terms of this Chapter.

(e) When a residential unit is approved for conversion to another use pursuant to the provisions of Subsection 41.13(a)(2), (a)(4) or (a)(5) above, such unit shall not be deemed to be reconverted into a residential unit regardless of any interim uses after payment as set forth in Subsections 41.13(a)(2), (a)(4) or (a)(5). (Added by Ord. 121-90, App.

4/12/90; amended by Ord. 134-01, File No. 001926, App. 7/6/2001)

SEC. 41.14. MANDATORY DENIAL OF PERMIT TO CONVERT.

A permit to convert shall be denied by Director of the Department of Building Inspection if:

(a) The requirements of Sections 41.12 or 41.13, above, have not been fully complied with;

(b) The application is incomplete or contains incorrect information;

(c) An applicant has committed unlawful action as defined in this Chapter within 12 months previous to the issuance for a permit to convert;

(d) The proposed conversion or the use to which the unit would be converted is not permitted by the City Planning Code. (Added by Ord. 121-90, App. 4/12/90; amended by Ord. 134-01, File No. 001926, App. 7/6/2001)

SEC. 41.15. APPROVAL AND ISSUANCE OF PERMIT TO CONVERT.

The Director of the Department of Building Inspection shall issue a permit to convert, provided that:

(a) The requirements of Section 41.12 have been met;

(b) Evidence of compliance with the requirements of Section 41.13 has been submitted. Satisfactory evidence of compliance may be:

(1) A certification of final completion or permit of occupancy on the replacement housing; or

(2) A receipt from the City Treasurer that the in-lieu payment determined by the Department of Real Estate has been received; and

(3) Evidence of compliance with the requirements of Section 41.17 herein.

(c) The proposed conversion or the use to which the unit would be converted is permitted by the City Planning Code.

(d) Concurrent with the issuance of a permit to convert, the Director of the Department of Building Inspection shall issue a new certificate of use which shall state the newly certified number of residential units and tourist units. (Added by Ord. 121-90, App. 4/12/90; amended by Ord. 134-01, File No. 001926, App. 7/6/2001)

SEC. 41.16. APPEAL OF DENIAL OR APPROVAL OF PERMIT TO CONVERT.

(a) Denial or approval of a permit application may be appealed to the Board of Permit Appeals, pursuant to Sections 8 et seq. Part III of the San Francisco Municipal Code.

(b) The owner or operator shall submit a statement under the penalty of perjury that he has notified all the affected permanent residents of his appeal and of the date, time and place of the hearing before the Board of Permit Appeals, seven calendar days prior to the scheduled hearing.

(c) The appellant shall have the burden of proving that the determination of the Director of the Department of Building Inspection is invalid. (Added by Ord. 121-90, App. 4/12/90; amended by Ord. 134-01, File No. 001926, App. 7/6/2001)

SEC. 41.17. RIGHTS OF PERMANENT RESIDENTS.

(a) To apply for a permit to convert, an owner or operator of the hotel shall do the following:

(1) Any interested community organization and all permanent residents residing in said building at the time of an application for a permit to convert and thereafter shall be timely informed of all public hearings and administrative decisions concerning said conversion; said notice shall be posted by the owner or operator;

(2) A permanent resident has the right to occupy his/her residential unit for 60 calendar days from the issuance of the permit to convert;

(3) Owner or operator shall offer a permanent resident available comparable units in the building, or to any replacement housing provided pursuant to Subsection 41.13(a)(1) or (2);

(4) All displaced permanent residents are entitled to relocation assistance as provided for in subsection (b) below;

(5) Seven calendar days prior to the filing of an application for a permit to convert, the owner or operator shall notify, in writing, by personal service, or registered or certified mail, every permanent resident affected by the proposed conversion of his/her intent to convert designated units;

(6) The notification required by Subsection (5) above shall also inform the permanent residents of their rights under Subsections (1) through (4) above.

(b) **Relocation Assistance**.

(1) A permanent resident, who as a result of the conversion of his/her unit must relocate off site, shall be reimbursed the actual moving expenses not to exceed $300 or may consent to be moved by the owner or operator.

(2) A displaced permanent resident shall have the right of first refusal for the rental or leasing of replacement units, if any, provided pursuant to the provisions of Sections 41.13(a)(1) or 41.13(a)(2).

(3) A permanent resident displaced by partially completed conversion under the provisions of Section 41.7(c) shall be entitled to a displacement allowance of $1,000 per displaced person. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.18. DEMOLITION.

(a) This section shall apply only to demolition of residential hotel buildings pursuant to an abatement order of the Director of Public Works or the Superior Court of the State of California, or demolition necessitated by major fires, natural causes or accidents where the cost of repair exceeds 50 percent of the replacement value of the building.

(b) Upon submission of an application for a demolition permit, the owner or operator shall post a copy of said application.

(c) Upon notification by the Central Permit Bureau that a demolition permit has been issued, the owner or operator shall post a notice explaining the procedure for challenging the issuance of the demolition permit to the Board of Permit Appeals.

(d) When issued a demolition permit, the owner or operator shall provide a written notice of the demolition within 10 calendar days of issuance of the permit to each residential permanent resident. Each permanent resident shall be notified in writing of his/her rights to relocation assistance and to occupy the same unit for a period of up to 60 days after issuance of the demolition permit.

(e) The subsequent issuance of a building permit for construction on the demolished site shall be conditioned on the owner or operator's agreement to replace, on a one-for-one basis, the demolished residential units as required by the provisions of Section 41.13. No building permit shall be issued until owner or operator complies with the provisions of Section 41.13.

(f) The conditions for issuance of a demolition permit set forth in subsection (e) above shall be recorded by the owner at the time of issuance of the demolition permit in order to provide notice of said conditions to all subsequent purchasers and interested parties. (Added by Ord. 121-90, App. 4/12/90)

SEC. 41.19. TEMPORARY CHANGE OF OCCUPANCY.

(a) **Temporary Change of Occupancy.**

(1) A tourist unit may be rented to a permanent resident, until voluntary vacation of that unit by the

permanent resident or upon eviction for cause, without changing the legal status of that unit as a tourist unit.

(2) A permanent resident may be relocated for up to 21 days to another unit in the residential hotel for purposes of complying with the Building Code requirements imposed by the UMB Seismic Retrofit Ordinance, Ordinance No. 219-92, without changing the designation of the unit.

(3) A residential unit which is vacant at any time during the period commencing on May 1st and ending on September 30th annually may be rented as a tourist unit, provided that (i) the residential unit was vacant due to voluntary vacation of a permanent resident or was vacant due to lawful eviction for cause after the permanent resident was accorded all the rights guaranteed by State and local laws during his/her tenancy, (ii) the daily log shows that the residential unit was legally occupied for at least 50 percent of the period commencing on October 1st and ending on April 30th of the previous year, unless owner or operator can produce evidence to the Department of Building Inspection explaining such vacancy to the satisfaction of the Department of Building Inspection, including but not limited to such factors as repair or rehabilitation work performed in the unit or good-faith efforts to rent the unit at fair market value; and (iii) the residential unit shall immediately revert to residential use upon application of a prospective permanent resident.

25-percent Limit.

However, at no time during the period commencing on May 1st and ending on September 30th may an owner or operator rent for nonresidential use or tourist use more than 25 percent of the hotel's total residential units unless the owner or operator can demonstrate that (i) the requirements

of 41.19(a)(3) above are met, (ii) good-faith efforts were made to rent such units to prospective permanent residents at fair market value for comparable units and that such efforts failed and (iii) the owner or operator has not committed unlawful action as defined in this Chapter within 12 months prior to this request. Owners or operators who seek to exceed this limit must request a hearing pursuant to Section 41.11(b) above and the decision whether to permit owners or operators to exceed this limit is within the discretion of the hearing officer.

(b) **Special Requirements for Hearings on Tourist Season Rental of Residential Units.** Where an owner or operator seeks a hearing in order to exceed the limit on tourist season rental of vacant residential units pursuant to Section 41.19(a)(3), the requirements of 41.11(b)(1), (b)(2) and (b)(3) above shall be applicable except as specifically modified or enlarged herein:

(1) **Notice of Hearing.** Notice of hearing as provided in Section 41.11(b)(1) above shall be given within 15 calendar days. The notice requirements for the owner or operator shall also be applicable to any interested party who has submitted a prior written request to the Director of the Department of Building Inspection to be notified of such hearings.

(2) **Time of Hearing.** The hearing shall be held within 30 days of the submission of the owner or operator's written request for hearing.

(3) **Burden of Proof.** Burden of proof is on the owner or operator.

(4) **Interested Party.** Any interested party shall be deemed a "party to the hearing" for purposes of Section 41.11(b)(1).

(5) **Determination of the Hearing Officer.** Based upon the evidence presented at the hearing, conducted in accordance with Section 41.11(b)(3) above, the hearing officer shall make findings as to (i) whether the residential unit was vacant due to voluntary vacation of a permanent resident or was vacant due to lawful eviction, (ii) whether the residential unit was occupied for at least 50 percent of the period commencing on October 1st and ending on April 30th of the previous year, (iii) whether the owner or operator has committed unlawful action under this Chapter within 12 months prior to this request, and (iv) whether the owner or operator made good-faith efforts to rent vacant residential units to prospective permanent residents at no more than fair market value for a comparable unit during the tourist season and yet was unable to secure such rentals. Good-faith efforts shall include, but not be limited to, advertising the availability of the residential units to the public. In determining fair market value of the residential units, the hearing officer shall consider any data on rental of comparable units, as defined in Section 41.4(b) herein.

(6) **Decision.** The hearing officer shall render a written decision and findings within 10 working days of the hearing.

(7) **Effect of Decision.** The hearing officer's decision shall remain in effect for the tourist season for which the owner or operator requested the hearing. If the owner or operator wishes to exceed the 25 percent limit during any subsequent tourist season, a new written request for hearing

must be submitted to the Director of the Department of Building Inspection.

(8) **Construction.** The purpose of this Section 41.19(b) is to supplement or modify provisions of Section 41.11(b) (1) through (b)(3). Unless otherwise specifically modified, all provisions of Sections 41.11(b)(1) through (b)(3) are deemed applicable to hearings concerning the tourist season limitation on rental of vacant residential units.

(c) **Winter Rentals.** A residential unit which is vacant at any time during the period commencing on October 1st and ending on April 30th annually may be rented as a tourist unit, provided that:

(1) Such owner or operator has been permitted to rent residential units as tourist units in excess of 25 percent of the residential units pursuant to Section 41.19(a)(3) above;

(2) The owner or operator has not committed unlawful action as defined in this Chapter within 12 months prior to the time of this request;

(3) A residential hotel may not rent in excess of 33 percent of the total number of residential units or 20 residential units, whichever is less, pursuant to this subsection;

(4) Applicants to temporarily convert residential units pursuant to this subsection shall submit applications to the Department of Public Works, in accordance with rules and regulations promulgated by the Department of Public Works;

(5) A maximum of 60 residential units may be approved per year to be rented as tourist units or

nonresidential units pursuant to this Subsection 41.19(c). In the event that the number of such applications exceeds 60 residential units, the Department of Public Works shall establish a lottery system based on priority ranking where preference shall be accorded to residential hotel owners who have been eligible more frequently than other hotel owners for temporary conversion pursuant to Subsection 41.19(a)(3) above;

(6) Such nonresidential use is permitted by the zoning for such residential hotel; and

(7) No application for such temporary conversion shall be approved by the Department of Public Works to fill the unused portion of the 60 residential unit limitation for the previous year. (Added by Ord. 121-90, App. 4/12/90; amended by Ord. 219-92, App. 7/14/92; Ord. 134-01, File No. 001926, App. 7/6/2001)

SEC. 41.20. UNLAWFUL CONVERSION; REMEDIES; FINES.

a) **Unlawful Actions.** It shall be unlawful to:

(1) Change the use of, or to eliminate a residential hotel unit or to demolish a residential hotel unit except pursuant to a lawful abatement order, without first obtaining a permit to convert in accordance with the provisions of this Chapter;

(2) Rent any residential unit for a term of tenancy less than seven days except as permitted by Section 41.19 of this Chapter;

(3) Offer for rent for nonresidential use or tourist use a residential unit except as permitted by this Chapter.

(b) **Hearing for Complaints of Unlawful Conversions.** Upon the filing of a complaint by an interested party that an unlawful conversion has occurred and payment of the required fee, the Director of the Department of Building Inspection shall schedule a hearing pursuant to the provisions of Section 41.11(b). The complainant shall bear the burden of proving that a unit has been unlawfully converted. The hearing officer shall consider, among others, the following factors in determining whether a conversion has occurred:

(1) Shortening of the term of an existing tenancy without the prior approval of the permanent resident;

(2) Reduction of the basic services provided to a residential unit intended to lead to conversion. For the purpose of this section, basic services are defined as access to common areas and facilities, food service, housekeeping services and security;

(3) Repeated failure to comply with order of the Department of Building Inspection or the Department of Public Health to correct code violations with intent to cause the permanent residents to voluntarily vacate the premises;

(4) Repeated citations by the Director of the Department of Building Inspection or the Department of Public Health for code violations;

(5) Offer of the residential units for nonresidential use or tourist use except as permitted in this Chapter;

(6) Eviction or attempts to evict a permanent resident from a residential hotel on grounds other than those specified in Sections 37.9(a)(1) through 37.9(a)(8) of the San Francisco Administrative Code except where a permit to convert has been issued;

(7) Repeated posting by the Director of the Department of Building Inspection of notices of apparent violations of this Chapter pursuant to Section 41.11(c) above.

(c) **Civil Penalties.** Where the hearing officer finds that an unlawful conversion has occurred, the Director of the Department of Building Inspection shall impose a civil penalty of three times the daily rate per day for each unlawfully converted unit from the day the complaint is filed until such time as the unit reverts to its authorized use. The daily rate shall be the rate unlawfully charged by the hotel owner or operator to the occupants of the unlawfully converted unit. The Director may also impose penalties upon the owner or operator of the hotel to reimburse City or complainant for the costs of enforcement, including reasonable attorneys' fees, of this Chapter. The hearing officer's decision shall notify the parties of this penalty provision and shall state that the Director of the Department of Building Inspection is authorized to impose the appropriate penalty by written notification to both the owner and operator, requesting payment within 30 days. If the penalty imposed is not paid, a lien to secure the amount of the penalty will be recorded against the real property pursuant to the provisions of Section 41.20(d) of this Chapter.

(d) **Lien Proceedings.** If any penalty imposed pursuant to Sections 41.10(d), 41.10(f), 41.11(f) or 41.20(c) is not received within the required time period, the Director of the Department of Building Inspection shall initiate proceedings

under Article XX of Chapter 10 of the San Francisco Administrative Code to make the penalty, plus accrued interest, a lien against the real property regulated under this Chapter. Except for the release of lien recording fee authorized by Administrative Code Sec. 10.237, all sums collected by the Tax Collector pursuant to this ordinance shall be held in trust by the Treasurer and distributed as provided in Section 41.8(e) of this Chapter.

(e) **Civil Action** An interested party may institute a civil proceeding for injunctive relief and damages. The Director of the Department of Building Inspection may institute a civil proceeding for injunctive relief. Counsel for the interested party shall notify the City Attorney's office of the City and County of San Francisco of any action filed pursuant to this section. In determining whether an unlawful conversion has occurred, the court may consider, among other factors, those enumerated in Section 41.20(b) of this Chapter. The interested party instituting a civil proceeding, or the City suing to enforce this Chapter, if prevailing parties, shall be entitled to the costs of enforcing this Chapter, including reasonable attorney's fees, pursuant to an order of the Court. (Added by Ord. 121-90 App. 4/12/90; amended by Ord. 322-00, File No. 001917, App. 12/28/2000; Ord. 134-01, File No. 001926, App. 7/6/2001)

SEC. 41.21. ANNUAL REVIEW OF RESIDENTIAL HOTEL STATUS.

(a) The Department of Building Inspection shall prepare and submit to the Board of Supervisors an annual status report containing the following:

(1) Current data on the number of residential hotels and the number of residential units in each of the residential

hotels in the City and County of San Francisco, including, to the extent feasible, information regarding rents, services provided, and violations of the City's codes;

(2) Current data on the number of residential hotel units converted pursuant to a permit to convert;

(3) Current data on the number of hotel units demolished or eliminated due to code abatement proceedings and fire;

(4) Current data on the number of residential hotel units illegally converted;

(5) Current data on the number of replacement housing units rehabilitated or constructed;

(6) A summary of the enforcement efforts by all City agencies responsible for the administration of this Chapter; and

(7) An evaluation of the workability and effectiveness of the permitted temporary change of occupancy procedures and winter rentals in Section 41.19 herein; and

(8) A report on expenditures from the San Francisco Residential Hotel Preservation Fund Account.

(b) The Economic and Social Policy Committee of the Board of Supervisors shall conduct a hearing on the annual report submitted by the Department of Building Inspection and shall recommend appropriate actions to be taken by the Board of Supervisors.

(c) The Department of Building Inspection should establish a San Francisco Residential Hotel Operators Advisory Committee composed of:

- 3 members nominated by the San Francisco Hotel Association (for-profit operators);

- 3 members nominated by the Golden Gate Hotel Association (for-profit operators);

- 2 members nominated by the Council of Community Housing Organizations (nonprofit hotel operators);

- Deputy Mayor for Housing.

The committee shall meet no less than once every three months to advise the Mayor's Office of Housing on matters including, but not limited to:

(1) Proposed revisions to this ordinance;

(2) Programs that various City agencies (i.e. Mayor's Office of Housing, Department of Social Services, etc.) should develop to assist the City's residential hotel operators;

(3) Any state or federal laws the City should support, oppose or seek to revise that impact residential hotel operators;

(4) Any new City, State or Federal programs the City shall encourage that would provide financial or technical support or assistance to San Francisco Residential Hotel Operators. (Added by Ord. 121-90, App. 4/12/90; amended by Ord. 134-01, File No. 001926, App. 7/6/2001)

SEC. 41.22. CONSTRUCTION.

(a) Nothing in this Chapter may be construed to supersede any other lawfully enacted ordinance of the City and County of San Francisco, except that definitions provided in this Chapter shall govern the enforcement of this Chapter.

(b) Clauses of this Chapter are declared to be severable and if any provision or clause of this Chapter or the application thereof is held to be unconstitutional or to be otherwise invalid by any court of competent jurisdiction, such invalidity shall not affect other provisions of this Chapter. (Added by Ord. 121-90, App. 4/12/90)